1494.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 160.

CHARLES A. TINKER, PLAINTIFF IN ERROR,

vs.

FREDERICK L. COLWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED NOVEMBER 21, 1902.

(18,738.)

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a Court of Appeals, from the First Department.

FREDERICK L. COLWELL, Respondent,
against
CHARLES A. TINKER, Appellant.

Case on Appeal from Order in a Special Proceeding.

Nelson Smith, attorney for appellant, 141 Broadway, New York.
Thomas McAdam, attorney for respondent, 220 Broadway, New York.

1 *Notice of Motion, Read in Support of Motion.*

Supreme Court of the State of New York.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

Please take notice that upon the annexed petition of Charles A. Tinker, the above-named defendant, verified April 17th, 1901, and the discharge in bankruptcy granted by the district court of the United States for the southern district of New York, discharging the said Charles A. Tinker from all his debts, pursuant to the acts of Congress relating to bankruptcy which existed on the 13th day of September, 1899, including the judgment, mentioned in said petition, recovered against him in the above-entitled action on the 9th day of February, 1897, a certified copy of said discharge under the seal of said district court of the United States being annexed to said petition, and a copy thereof herewith served upon you, an application will be *be* made to this court, at a special term, part I, to be held in the county court house, in the county of New York,
2 on the 12th day of June, 1901, at the opening of court, or as soon thereafter as counsel can be heard, for an order directing said judgment to be cancelled and discharged of record, pursuant to the statute in said case made and provided, and for such other and further relief as the said petitioner may be entitled to.

Dated May 24th, 1901.

NELSON SMITH,
Att'y for C. A. Tinker, Petitioner,
141 *Broadway, N. Y. City.*

To Frederick L. Colwell, Esq., plaintiff; Thomas McAdam, Esq., att'y for plaintiff, 220 Broadway, N. Y. city.

3 *Petition, Read in Support of Motion.*

Supreme Court, County of New York.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

To the supreme court of the State of New York:

The petition of Charles A. Tinker, respectfully shows to this honorable court:

I. That this was an action by the said Frederick L. Colwell, as plaintiff, against your petitioner as defendant, for criminal conversation with his wife; that judgment was recovered in said action against your petitioner, as defendant therein, on the 9th day of February, 1897, for $50,000 damages, with $653.98 costs, amounting in the aggregate to the sum of $50,653.98; that the judgment roll in said action was duly filed in the office of the clerk of the city and county of New York on said 9th day of February, 1897, and that said judgment on that day was duly docketed in the said county clerk's office.

II. That your petitioner did not own or possess, nor have any interest in, any real property at the time of the recovery of said judgment, nor since the recovery of the same, and that hence
4 the said judgment is not, and has never been, a lien on any real property of your petitioner.

III. That your petitioner is, and at the time of the bankruptcy proceeding hereinafter mentioned was, and for more than a year next immediately preceding the commencement of said bankruptcy proceedings had been a resident of the city, county and State of New York, and had a place of business in said city and county where he resided, namely, No. 124 West 121st street, in the said city and county.

IV. That on the 13th day of September, 1899, your petitioner duly filed his petition in the office of the clerk of the district court of the United States for the southern district of New York, addressed to the Hon. Addison Brown, as judge of said district court, pursuant to the acts of Congress relating to bankruptcy, and praying that he might be adjudged by the said district court to be a bankrupt within the purview of the said acts of Congress. That such proceedings were duly had upon such petition; that your petitioner was, on the 13th day of September, 1899, duly adjudged a bankrupt by the said district court, under and pursuant to the acts of Congress relating to bankruptcy.

That such further proceedings were duly had in the said bankruptcy proceedings; that your petitioner was, on the second day of February, 1900, by the order and judgment of the said district court

of the United States, duly discharged from all debts and claims which were made provable by the said acts of Congress against his estate, and which existed on the 13th day of September, 1899, on which day the said petition for his adjudication was filed, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

5 V. That the said judgment was not recovered against your petitioner for a wilful and malicious injury to the person or property of the said Frederick L. Colwell, within the meaning of the said acts of Congress, and that by virtue of the said order, judgment and discharge so granted by the said district court of the United States, your petitioner has been duly discharged from the said judgment, as he is informed and verily believes; that a certified copy of the said discharge, duly certified by the clerk of the said district court, under the seal of the said court, is hereto annexed and forms a part of this petition, which certified copy your petitioner exhibits to this court.

VI. That the said judgment was the only debt of your petitioner or demand against him mentioned in his said petition in bankruptcy, filed as aforesaid; that the said judgment creditor, Frederick L. Colwell, appeared in said bankruptcy matter in opposition to your petitioner's application for a discharge, and filed in the clerk's office of said district court specifications against the same, a copy of which is hereto annexed, forming a part hereof. That your petitioner filed in the said clerk's office exceptions to the said specifications, a copy of which is hereto annexed and also forms a part hereof. That the said district court duly made an order sustaining your petitioner's exceptions to said specifications and overruling the said specifications, and ordering that your petitioner, as such bankrupt, be discharged from all debts and claims which are made provable by the bankrupt acts against his estate, and which existed on the 13th day of September, 1899, a copy of which order of the said district court is hereto annexed and forms a part hereof.

Wherefore, your petitioner prays that an order may be made by this honorable court directing that the said judgment be cancelled and discharged of record, in the office of the clerk of the city

6 and county of New York, and that your petitioner may have such other and further relief in the premises as may be just and proper, and your petitioner will forever pray, etc.

CHARLES A. TINKER, *Petitioner.*

NELSON SMITH,
Att'y for Petitioner.

COUNTY OF NEW YORK, *ss:*

Charles A. Tinker, being duly sworn, deposes and says: That he is the petitioner in the above petition, which is signed by him. That he has heard the said petition read and knows the contents thereof; that the same is true to the knowledge of deponent, except

as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CHARLES A. TINKER.

Sworn to before me this 17th day of April, 1901.

FREDERICK WILLETS,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

7 *Certified Copy of Discharge in Bankruptcy of Charles A. Tinker, Read in Support of Motion.*

No. 1466.

District Court of the United States, Southern District of New York.

Whereas, Charles A. Tinker, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Charles A. Tinker be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 13th day of September, A. D. 1899, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable Addison Brown, judge of said district court, and the seal thereof, this 2d day of February, A. D. 1900.

ADDISON BROWN,
District Judge.

SAMUEL H. LYMAN, *Clerk.*

I, Samuel H. Lyman, clerk of the district court of the United States for the southern district of New York, do hereby certify that the above is a true copy of an order of discharge made in the above entitled matter.

In testimony whereof, I have caused the seal of the said court to be hereto affixed, at the city of New York, in the southern district of New York, this 28th day of January, in the year of our Lord one thousand nine hundred and one and of the Independence of the said United States the one hundred and twenty-fifth.

[SEAL.]

SAMUEL H. LYMAN, *Clerk.*

8 *Specification of Objections of Frederick L. Colwell to the Discharge of Charles A. Tinker in Bankruptcy, Read in Support of Motion.*

In the District Court of the United States for the Southern District of New York.

In the Matter of CHARLES A. TINKER, Bankrupt.

Frederick L. Colwell, of the borough of Manhattan, city of New York, in the county of New York and State of New York, a party interested in the estate of said Charles A. Tinker, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specifications:

I. That said alleged bankrupt's schedules show that he has no outstanding dischargeable debts and, therefore, this court has no jurisdiction to discharge that which does not exist.

II. Said schedules show that the only creditor of said alleged bankrupt is the undersigned, Frederick L. Colwell, who is the judgment creditor, owning a certain judgment obtained by him against said alleged bankrupt for fifty thousand ($50,000) dollars damages and costs on a cause of action charging the said bankrupt with criminal conversation with said creditor's wife. That said
9 cause of action involved the wilful and malicious injury to the person or property of another, and comes under the exceptions enumerated in subdivision 2 of sec. 17 of the bankruptcy act, and is not a dischargeable debt.

III. The petition and schedules annexed show that the real object of these proceedings is to have discharged, if possible, the said judgment of the undersigned, or if this be not so, it must be to rid himself of some other unknown creditors whose names have been concealed, and who have had no notice of these proceedings, and the attempt to procure a discharge is in the nature of a fraud upon the bankruptcy act.

IV. The question of jurisdiction being always open, it is here distinctly raised that it may be passed upon with respect to said judgment, and the cause of action represented by it.

FREDERICK L. COLWELL.

(A copy.)

COUNTY OF NEW YORK, *ss:*

Frederick L. Colwell, being duly sworn, deposes and says: He is a creditor of Dr. Charles A. Tinker, an alleged bankrupt; that he has read the foregoing specifications and knows the contents of the same; that the same are true of his own knowledge, except as to the

matters therein stated to be on information and belief, and as to those matters he believes them to be true.

FREDERICK L. COLWELL.

Sworn to before me this 5th day of January, 1900.
A. JACOBY,
Notary Public, N. Y. Co.

10 *Exceptions of Chas. A. Tinker, Bankrupt, to the Specifications of Objections of Mr. Colwell to His Discharge in Bankruptcy, Read in Support of Motion.*

District Court of the United States, Southern District of New York.

In the Matter of CHARLES A. TINKER, Bankrupt.

Exceptions of the bankrupt to the specifications filed by Frederick L. Colwell, a creditor.

The said Charles A. Tinker, bankrupt, hereby excepts to the specifications filed by Frederick L. Colwell, a creditor, on the following grounds:

I. That the said specifications do not state any facts to bar or prevent him from obtaining his discharge from his debts in this proceeding and that they are insufficient to prevent him from obtaining his discharge herein from his debts.

II. That said specifications are insufficient to oust the court of its jurisdiction in this matter to give the said bankrupt a discharge from his debts herein pursuant to the statute.

Wherefore, the said bankrupt prays that these exceptions to the said specifications may be sustained, and that the said Frederick L. Colwell may take nothing by the said specifications.

NELSON SMITH,
Attorney for said Bankrupt, 146 Broadway New York City.

11 *Order Sustaining Exceptions and Overruling Objections to Bankrupt's Discharge in Bankruptcy Read in Support of the Motion.*

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of CHARLES A. TINKER, Bankrupt.

At the city of New York, in said district, on the 27th day of January, 1900, before the Hon. Addison Brown, judge.

This cause having come on to be heard upon the petition of the bankrupt to be discharged from his debts, pursuant to the bankrupt acts, the referee's report, the specifications of Frederick L. Colwell, a judgment creditor, filed in opposition to such discharge, and the ex-

ceptions of the bankrupt to such specifications, and after hearing Nelson Smith, of counsel for the bankrupt, and Thomas McAdam, of counsel for such judgment creditor,

It is ordered by the court that the said exceptions be sustained and said specifications in opposition be and are hereby overruled, and that the said Charles A. Tinker, bankrupt, be discharged from all debts and claims which are made provable by the bankrupt acts against his estate, and which existed on the 13th day of September,
A. D. 1899, on which day the petition for adjudication was
12 filed by him, excepting such debts as are excepted from the operation of a discharge in bankruptcy.

ADDISON BROWN.

Endorsed: Filed February 2d, 1900.

"Service of the within petition, copy order of discharge in bankruptcy and notice of motion admitted.

Dated June 1st, 1901.

THOMAS McADAM,
Attorney for Plaintiff Colwell."

Affidavit of Service.

Supreme Court.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

STATE OF NEW YORK,
County of New York, } ss:

Frank A. Cox, being duly sworn, deposes and says: That he served the annexed petition and notice of motion in this action on Frederick L. Colwell, the plaintiff herein, by delivering to and leaving with him personally a copy of said petition and notice of motion.

13 That such service was made on said Frederick L. Colwell on the 6th day of June, 1901, at No. 45 Broadway, borough of Manhattan, city of New York.

That deponent knew the person so served to be the same person mentioned and described in said petition and notice of motion as the plaintiff in this action.

That the deponent is of the age of 21 years and upwards and resides at No. 463 Jefferson avenue, borough of Brooklyn, in the city of New York.

FRANK A. COX.

Sworn to before me this 8th day of June, 1901.

JOHN C. TRAVIS,
Commissioner of Deeds, City of New York, No. 50.

14 *Order of the Special Term Denying Motion.*

At a special term of the supreme court of the State of New York, held at the county court house, in the county of New York, on the 1st day of July, 1901.

Present: Hon. Henry A. Gildersleeve, justice.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

On reading and filing notice of motion and the petition of said Charles A. Tinker, verified April 17th, 1901, praying for the discharge of record of the judgment mentioned in said petition recovered in this court by said Frederick L. Colwell against him on the 9th day of February, 1897, for the sum of $50,653.98, and the papers annexed to said petition, namely, a certified copy of the discharge in bankruptcy, granted to said petitioner on the 2d day of February, 1901, by the district court of the United States for the southern district of New York, the specifications of objections by the said judgment creditor to the said discharge, verified January 5th, 1900; the exceptions by the said Charles A. Tinker to said specifications of said objections and the order of the said district court, filed February 2d, 1900, sustaining said exceptions and overruling
15 said objections; and after hearing Nelson Smith, Esq., of counsel for the said petitioner, in support of said motion, and Thomas McAdam, Esq., of counsel for the judgment creditor, in opposition thereto,

It is, on motion of the counsel of said judgment creditor, ordered that the said motion be, and the same hereby is, denied, with ten dollars costs, without prejudice to any right the petitioner may have to prosecute an action to procure a determination of the effect of said discharge in bankruptcy upon said judgment, or otherwise test the validity of said discharge as a release of said petitioner from said judgment.

This order is directed to be entered *nunc pro tunc* as of July 1st, 1901, and is in resettlement of the order entered herein on that day. Ent.

H. A. G., *J.*

Endorsed: "Filed Aug. 8th, 1901, *nunc pro tunc* as of July 1st, 1901."

16 *Notice of Appeal to Appellate Division.*

Supreme Court, County of New York.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

Please take notice that the defendant, as petitioner, hereby appeals to the appellate division of the supreme court, in the first department, from the order made in the above-entitled action by the special term of the court (part I), bearing date July 1st, 1901, and entered in the office of the clerk on August 8th, 1901, *nunc pro tunc* as of July 1st, 1901, denying the application of said defendant, as petitioner, to cancel and discharge of record the judgment recovered against him in the above-entitled action on the 9th day of February, 1897, for $50,653.98 damages and costs, and mentioned in the defendant's petition herein, and from the whole and every part of said order.

Dated New York, August 8th, 1901.

NELSON SMITH,
Attorney for said Defendant, as Petitioner and Appellant, 141 Broadway, N. Y. City.

To Thomas McAdam, Esq., attorney for plaintiff and judgment creditor, respondent. Frederick L. Colwell, plaintiff. William Sohmer, clerk.

17 Service of the within notice of appeal and notice of filing is hereby admitted.

Dated August 8th, 1901.

THOMAS McADAM,
Attorney for Respondent.

Opinion of the Special Term.

COLWELL
vs.
TINKER.

GILDERSLEEVE, *J.*:

On February 9, 1897, the plaintiff recovered a judgment against the defendant for $50,000 for criminal conversation with plaintiff's wife. The defendant here moves to have said judgment canceled and discharged of record. The defendant swears that he had no real estate at the time of the entry of the judgment, and has not had any interest in real estate since such recovery, and that the judgment,

therefore, is no lien upon any real estate. On the 13th of September, 1899, defendant filed a petition for adjudication in bankruptcy. The plaintiff objected to the discharge of defendant in bankruptcy on the ground that the only creditor of the bankrupt, as shown by the schedules, was the plaintiff, the owner of the aforesaid judgment, and that said judgment was recovered in an action involving the wilful and malicious injury to the person or property of another, and, therefore, came under the exceptions enumerated in subdivisions 2 of section 17 of the bankruptcy act, and was, in consequence, not a debt from which defendant could be discharged. The objections of plaintiff were duly considered and overruled by Judge Brown, on or about January 27, 1900, and on February 2, 1900, an order of the district court of the United States for this district was duly entered, discharging the defendant from all debts which
18 existed on September 13, 1899, the date of the filing of the petition for adjudication in bankruptcy, "excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." Section 1268 of the Code of Civ. Pro. provides that at any time after one year has elapsed since a bankrupt was discharged from his debts under the bankruptcy act, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him for an order directing the judgment to be cancelled and discharged of record, and, if it appears that he has been discharged from the payment of that judgment, or the debt upon which it was recovered, such order must be granted. Section 17, subdivision 2, of the bankruptcy act provides that the discharge shall not release the bankrupt from judgments in actions for wilful and malicious injuries to the person or property of another. The plaintiff claims that the decision of Judge Brown overruling plaintiff's objections to the discharge of defendant does not render the question of defendant's discharge from the said judgment *res adjudicata*, for the reason that, in his opinion, the Federal judge stated that the discharge would be operative against other debts, whether enumerated or not, and that jurisdiction did exist, and that he declined to pass on the question whether the plaintiff's judgment herein was dischargeable or not. The opinion is not handed up on this motion, but this statement of the plaintiff's counsel appears to be conceded by his adversary, so I will accept it as true. The question, therefore, which I am here called upon to decide is whether an action for criminal conversation is one for "wilful and malicious injuries to the person or property of another." It is, of course, not pretended that Tinker, in forming his culpable relations with Mrs. Colwell, was actuated merely by a "wilful and malicious" desire to injure Colwell, nor, indeed, is there any positive reason for believing that such a motive played any part in the matter. It may well be said, however, that
19 it was a "wilful injury," as it was not done inadvertently. It was an injury to the person of Colwell, in the sense that his peace of mind and happiness were greatly damaged by the loss of his wife's affections (Code, sec. 3343, subd. 9). It was also an

injury to the property of Colwell. A husband has a right to the services of his wife, while they live together and she is not engaged in a separate business, and he also has a right to her society and comfort. Tinker, by his seduction of Mrs. Colwell, has deprived Colwell of the services, comfort and society of his wife. We have, therefore, unquestionably, a wilful injury to the person and property of another. But was that injury malicious? As I have above intimated, there is no proof of actual malice. But was there constructive malice? Malice has been defined as a disregard of social duty and of the rights of others (98 Tenn., 48). The term malice, as applied to torts, such as criminal conversation, does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. As defined by Judge Brown, in the case of United States *v.* Reed, 86 Fed. Rep., 309, "Malice consists in one's wilful doing of an act, or wilful neglect of a known obligation, which he knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular individual is not an essential element." It seems to me that the judgment which the defendant here seeks to have vacated was recovered in an action founded upon wilful and malicious injuries to the person and property of another. It was, therefore, under the provisions of section 17, subdivision 2 of the bankruptcy act, not affected by defendant's discharge in bankruptcy. Motion denied with $10 costs.

20 *Waiver of Certification.*

It is hereby stipulated that the foregoing consists of true copies of the original papers which were used on the motion in the court below, and of the whole thereof, specified in the order appealed from, and of said order and the notice of appeal and the opinion of the court below, and certification by the clerk is hereby waived.

Dated August 21, 1901.

NELSON SMITH,
Attorney for Appellant.
THOMAS McADAM,
Attorney for Respondent.

21 *Order of Affirmance of the Appellate Division.*

At a term of the appellate division of the supreme court of the State of New York, held in and for the first department, at the court house of the said appellate division, in the county of New York, on the 8th day of November, 1901.

Present: Hon. Charles H. Van Brunt, P. J. Hon. Edward Patterson, Hon. Morgan J. O'Brien, Hon. George L. Ingraham, Hon. Frank C. Laughlin, JJ.

FREDERICK L. COLWELL, Respondent,
against
CHARLES A. TINKER, Appellant.

The above-named Charles A. Tinker, having appealed to the appellate division of the supreme court, first department, from the order made at the special term of the court in the above-entitled case, bearing date July 1st, 1901, and entered in the office of the clerk of the county of New York on August 8th, 1901, *nunc pro tunc* as of July 1st, 1901, denying the application of said Charles A. Tinker as petitioner to cancel and discharge the judgment of record recovered against him in the above-entitled action by the above named
22 Frederick L. Colwell on the 9th day of February, 1897, mentioned in the petition herein, for $50,653.98 damages and costs, and said appeal having been heard by this court, and after hearing Nelson Smith, Esq., of counsel for the said appellant in support of said appeal, and Thomas McAdam, Esq., of counsel for the respondent in opposition thereto, and due deliberation having been had,

Now, on motion of Thomas McAdam, attorney for respondent,

It is ordered that the order appealed from be, and the same is, affirmed, with $10 costs and disbursements, with leave to the appellant to renew said application to cancel said judgment upon such additional papers as he may be advised.

Enter.

C. H. V. B.

Endorsed: Filed Dec. 9th, 1901.

Certification of Order.

Appellate Division of the Supreme Court, State of New York, First Judicial Department.

Clerk's Office, New York County.

FREDERICK L. COLWELL
against
CHARLES A. TINKER.

I, Alfred Wagstaff, clerk of the appellate division of the supreme court, in the first judicial department, do hereby certify that
23 the foregoing is a copy of the order made by said court upon the appeal in the above-entitled action or proceeding, and entered in my office on the ninth day of December, 1901, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New York, this ninth day of December, 1901.

[SEAL.] ALFRED WAGSTAFF, *Clerk.*

Endorsed by the clerk of the county of New York.
Filed December 9th, 1901.

Notice of Appeal to the Court of Appeals.

Supreme Court, County of New York.

FREDERICK L. COLWELL, Respondent,
against
CHARLES A. TINKER, Appellant.

Please take notice that the above-named Charles A. Tinker, appellant, hereby appeals to the court of appeals of the State of New York from the order of the appellate division of the supreme
24 court of said State, first department, bearing date November 8th, 1901, and entered in the office of the clerk of said appellate division on the 9th day of December, 1901, and in the county clerk's office of the county of New York on the same day, affirming the order of the special term of the supreme court made in the above case, bearing date July 1st, 1901, and entered in the office of the clerk of the county of New York on August 8th, 1901, *nunc pro tunc* as of July 1st, 1901, which order denied the application of the said appellant to cancel the judgment recovered against him by the said Frederick L. Colwell on the 9th day of February, 1897, for the sum of $50,653.98, mentioned in the petition of said Charles A. Tinker, and from the whole and every part of the said order of said appellate division.

Dated New York, December 10th, 1901.

NELSON SMITH,
Attorney for Appellant, 141 *Broadway, New York City.*

To Thomas McAdam, Esq., attorney for respondent, 220 Broadway, New York city. William Sohmer, clerk of county of New York.

Endorsed: Filed Dec. 9th, 1901.

Service of within notice of appeal and notice of filing is hereby admitted.
December 10th, 1901.

THOMAS McADAM,
Attorney for Respondent.

M. J. D.

25 *Stipulation as to Correctness of Case.*

Court of Appeals.

FREDERICK L. COLWELL, Respondent,
against
CHARLES A. TINKER, Appellant.

It is hereby stipulated that the foregoing consists of copies of the notice of appeal to this court, the order of the appellate division of the supreme court, first department, appealed from to this court, and the papers on which the court below acted in making such order.

Dated December 13, 1901.

NELSON SMITH,
Att'y for Appellant.
THOS. McADAM,
Att'y for Respondent.

26 *Opinion of the Appellate Division.*

Supreme Court, Appellate Division, First Department, October, 1901.

Charles H. Van Brunt, P. J.; Edward Patterson, Morgan J. O'Brien, George L. Ingraham, Frank C. Laughlin, JJ.

FREDERICK L. COLWELL, Respondent,
vs.
CHARLES A. TINKER, Appellant. } No. 3411.

Appeal from order denying application to cancel of record judgment recovered against defendant.

Nelson Smith, for appellant.
Thomas McAdam, for respondent.

Per Curiam:

By the order from which this appeal is taken, an application made by the defendant to vacate a judgment, under the provisions of section 1268 of the Code of Civil Procedure, was denied. That application was made upon a petition presented by the defendant, in which he set forth that on the 13th day of September, 1899, he was duly adjudged a bankrupt by the district court of the United States for the southern district of New York, and that such proceedings were subsequently had thereupon; that on the 2d day of February,
27 1900, by an order and judgment of that court, he was discharged from all debts and claims which were made provable against his estate and which existed on the 13th day of September, 1899. He further represented in his petition that the only debt or demand against him mentioned in his petition in bankruptcy was

one arising upon a judgment recovered by the plaintiff in this action; and he also set forth "that the said judgment was not recovered against your petitioner for a wilful and malicious injury to the person or property of the said Frederick L. Colwell, within the meaning" of the bankruptcy law; but he also stated that the action in which such judgment was recovered was one brought against him for criminal conversation with the wife of the judgment creditor, and that the judgment was for the sum of fifty thousand dollars and costs and was entered on the 9th day of February, 1897, in the office of the clerk of the city and county of New York.

It appears in the record that Colwell, the plaintiff herein, appeared in the defendant's bankruptcy proceeding and objected to a discharge being granted, and in his objections filed, stated that he was the judgment creditor of the bankrupt, the owner of the judgment for fifty thousand dollars and costs, and that such judgment was recovered on a cause of action charging the said bankrupt with criminal conversation with said creditor's wife, and that such cause of action involved a wilful and malicious injury to the person or property of another and, therefore, was not discharged by the bankruptcy law.

It is provided by section 17 of the bankruptcy act (30 U. S. Stat. at Large, at p. 550), in effect, that a discharge in bankruptcy does not release the bankrupt from judgments in actions for wilful and malicious injury to the person or property of another. By the Code of Civil Procedure of the State of New York (§ 3343, subdiv. 9) a personal injury is defined as including libel, slander, *criminal*
28 *conversation*, seduction and malicious prosecution; also assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another.

The test of the defendant's right to have the judgment vacated under the provisions of section 1268 of the Code of Civil Procedure, depends upon its having been recovered for a personal injury wilfully and maliciously inflicted. We have nothing before us to show upon what the judgment against this appellant was based, except a mere general allegation that it was in an action for criminal conversation. The moving party insists it was not for a wilful and malicious injury, but the opposing party as strenuously contends that it was based upon such an injury. We cannot determine the real nature of the action upon the simple characterization that each party has given it. In order that its real nature may be known, the judgment record should be presented to the court. An action for criminal conversation does not necessarily involve malice against the plaintiff, but that element may be involved, and before a determination can be had upon the subject the judgment record should be before the court.

For this reason the order appealed from should be affirmed, with $10 costs and disbursements, but with leave to the appellant to renew his motion to vacate the judgment upon proper and sufficient papers.

Ingraham, J., concurs in result.

29 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 31st day of January, in the year of our Lord one thousand nine hundred and two, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, February 1st, 1902.

30 FREDERICK L. COLWELL, Respondent,
vs.
CHARLES A. TINKER, Appellant.

Be it remembered, that on the 14th day of December in the year of our Lord one thousand nine hundred and one, Charles A. Tinker the appellant in this action, came here into the court of appeals, by Nelson Smith, his attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the first judicial department. And Frederick L. Colwell, the respondent in said action afterwards appeared in said court of appeals by Thomas McAdam his attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals having heard this cause argued by Mr. Nelson Smith of counsel for the appellant, and by Mr. Thomas McAdam of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

31 Therefore, it is considered that the said order be affirmed, with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *February 1st*, 1902.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

Filed Feb. 14, 1902.

31½ [Endorsed:] In the court of appeals from the appellate division of the supreme court, first dept. Frederick L. Colwell, respondent ag'st Charles A. Tinker, appellant Return Appeal from order in a special proceeding. Remittitur. Nelson Smith, att'y for appellant, 141 Broadway, N. Y. Thomas McAdam, att'y for respondent 220 Broadway. N. Y.

32 At a special term of the supreme court of the State of New York, held in and for the county of New York, part II thereof, in the county court house in said county on the 14th day of February, 1902.

Present: Hon. Miles Beach, justice.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

This cause having been brought on upon the remittitur sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the above named defendant from the order of this court to said court of appeals and that the said order of this court has been affirmed by said court with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court and this court directed to enforce the judgment of the court of appeals according to law, now therefore on motion of Thomas McAdam, of counsel for the above named plaintiff, it is

Ordered and adjudged that the judgment of the said court of appeals be and the same is hereby made the judgment of this court and that the plaintiff have execution against the defendant for the costs of said appeal as well as for the costs in this court amounting to the sum of $110.90 as taxed, and that this judgment be annexed to the judgment roll.

MILES BEACH, *J. S. C.*

Endorsed: Judgment roll. Filed Feb'y 14th, 1902.

33 STATE OF NEW YORK, }
County of New York. }

Clerk's office of the supreme court of the State of New York for the county of New York.

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court of the State of New York for the said county of New York by virtue of the annexed writ of error, which was served upon me on the 19th day of November, 1902, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 32 inclusive, contain a true and complete transcript of the record and proceedings had in the said court in the suit between Frederick L. Colwell and Charles A. Tinker mentioned in said writ of error as the same remain of record and on file in my office, and that annexed hereto is the petition for said writ of error, the citation to the defendant in error with proof of service of the same, the said writ of error served upon me, the appearance of the defendant in error and waiver of security for costs, and the plaintiff's assignment of errors with a copy of the opinion of the court of appeals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at my office in the city and county of New York on the 19th day of November 1902.

[Seal New York.]

THOS. L. HAMILTON, *Clerk.*

34 [Endorsed:] In the Supreme Court of the United States. October term 1902. Charles A. Tinker, pl'ff in error against Frederick L. Colwell, def't in error Return of the clerk of the supreme court of the State of New York to the writ of error in this case. Nelson Smith, att'y for pl'ff in error, 141 Broadway, city of New York.

35 *Opinion of the Court of Appeals.*

FREDERICK L. COLWELL, Respondent,
v.
CHARLES A. TINKER, Appellant.

(Decided January 31, 1902.)

Appeal from a final order in a special proceeding made by the appellate division of the supreme court in the first judicial department, affirming an order of the special term, which denied the prayer of the appellant to cancel of record, in the New York county clerk's office, a judgment recovered against him by the respondent.

Nelson Smith for appellant.
Thomas McAdam for respondent.

BARTLETT, *J.:*

The respondent recovered in the supreme court a judgment against the appellant on the ninth day of February, 1897, which was entered in the clerk's office of the county of New York, for $50,653.98, damages and costs, in an action for criminal conversation with his wife. On the thirteenth day of September, 1899, the appellant was adjudicated a bankrupt on his own petition by the district court of the United States for the southern district of New York. On the second day of February, 1890, the appellant was duly discharged.

Section 17 of the bankruptcy act reads in part as follows: "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (1) * * *; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; * * *"

Section 1268 of the Code of Civil Procedure provides in substance that at any time after one year has elapsed since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which the judgment was rendered against him for an order directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which it was recovered, an order must be made directing that it be canceled and discharged of record.

When the bankrupt applied for his discharge to the United States district court the respondent challenged the jurisdiction of the court, on the ground that the only debt appearing in the schedules of the bankrupt was the judgment referred to in the action for

criminal conversation, and as that could not be discharged by proceedings in bankruptcy, the court was precluded from granting the discharge, as there was nothing for it to operate upon. The learned district judge, in sustaining the exception to this objection, held that the ordinary course of procedure in adjudging discharges is to grant the application if the bankrupt is otherwise entitled to
36 the discharge without determining in any way the effect of its releasing any particular debt, whether contained in the schedules or not, and thereupon the discharge was granted.

After the expiration of one year from the time of the discharge of the bankrupt, he applied for the cancellation of the judgment under section 1268 of the code. The special term denied the motion on the ground that the judgment was recovered for willful and malicious injuries to the person and property of another. The appellate division affirmed this order, but with leave to appellant to renew the application upon such additional papers as may be advised. This leave to renew was based upon the view entertained by the learned court that nothing was before them to show upon what the verdict against the appellant was based except a general allegation that it was an action for criminal conversation, and that the real nature of the action could not be determined unless the judgment record was before the court, as an action for criminal conversation does not necessarily involve malice against the plaintiff.

It is, therefore, important to determine what is implied by a judgment entered upon the verdict of a jury finding the defendant guilty of criminal conversation with the plaintiff's wife. Section 3343 of the code, subdivision 9, defines a "personal injury" to be, among other things, criminal conversation. As this is a mere legislative definition of a personal injury, for the guidance of the courts in this State, it may be regarded for the purposes of this discussion as of no binding force in the determination of the Federal question now presented. It is very clear upon principle and authority that criminal conversation is a willful and malicious injury to both the person and the property of the husband.

In the recent case of *In re Freche* (5 American Bankruptcy Reports, 479) the United States district court of New Jersey held that a judgment in a father's action for the seduction of his daughter, under the law of New Jersey, is one for the willful and malicious injury to the person and property of another, within the meaning of section seventeen of the bankruptcy act, and is not released by a discharge. The learned district judge in his opinion uses this language: "The judgment recovered in this case in the State court is based upon the theory of compensating the plaintiff for the injuries which he had sustained to his person or property, or both. From the nature of the case, the act of the defendant Freche, which caused the injury, was willful because it was voluntary. The act was unlawful, wrongful and tortious, and being willfully done, it was in law malicious. It was malicious because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant Freche must

be presumed to have had in mind when he committed the offense. 'Malice' in law simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. While it might be true that in the
37 unlawful act Freche was not actuated by hatred or revenge, or passion toward the plaintiff, nevertheless if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty and purposely prejudicial and injurious to another, the law will imply malice." (See, also, *United States v. Reed*, 86 Fed. Rep. 308, 312.)

The husband's right to the services of his wife is a right of property. In *Cregin v. Railroad* (75 N. Y., 192) Judge Rapallo, speaking of this right, said: "He had the right to the services of his wife, they were of pecuniary value to him, and any wrong by which he was deprived of those services, or put to expense to remedy or palliate the consequences of the injury to his wife, was a wrong done to his rights and interests." (See also the same case reported in 83 N. Y., 595.) On principle criminal conversation with the wife is a personal injury to the husband without regard to the statutory declarations to that effect in this State.

While loss of service is usually pleaded in this form of action, yet its real foundation is the personal injury inflicted upon the husband. The offense charged is a most grievous wrong against social order and society; it strikes at the foundations of the home and the legitimacy of offspring. The husband, who is entitled to live with his wife and enjoy her society in the marriage relation, finds himself humiliated and, to a certain extent, disgraced by a public scandal; the marriage bed is dishonored; his domestic peace and comfort are destroyed and he is subjected to great mental suffering.

In *Bromage v. Prosser* (4 Barn. & Cress., 247), Bayley, J., writing in an action for words spoken of the plaintiffs in their trade and business as bankers, said: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."

If there is such a thing as malice in law, and if it is ever presumed by reason of the act committed, it would seem to be in an action for criminal conversation, where a jury has awarded the injured husband damages in the sum of fifty thousand dollars. The defendant alleges this recovery in his petition upon which this proceeding is founded.

In many causes of action it is apparent that to determine whether an act is willful or malicious the surrounding circumstances must be considered, but in an action for criminal conversation, the fact of criminal intercourse being established, malice in law must follow, and the circumstances are important only on the question of damages.

A person voluntarily invading and destroying the marriage relation is guilty of a willful, wanton act, and it is not necessary to prove that he was moved by hatred, revenge or passion towards the husband. The law in such a case implies malice, and the judgment

that follows is for both a willful and malicious injury to the person and property of another.

The policy of the bankrupt law is to discharge the honest and unfortunate debtor from his contract obligations, and not free him from judgments involving his fraud, which implies moral
38 turpitude or intentional wrong, or judgments for willful and malicious injuries to the person or property of another.

In the case of *Re Cotton* (2 N. Y. Legal Observer, 370) the court, in commenting on this latter class of cases, said: "In all of these cases it is held that the payments provided for by the judgments and decrees are of penalties or fines imposed for wrongful or criminal acts, or to enforce a moral or natural duty, rather than of the nature of debts." (See, also, *In re Blumberg*, 1 Amer. Bankruptcy Repts. 634.)

The real nature of this action is sufficiently apparent from the petition of the defendant.

The order of the special term, in denying the defendant's motion that the judgment in this action be canceled and discharged of record, protects the defendant, as it is without prejudice to any right he may have to prosecute an action to procure a determination of the effect of the discharge in bankruptcy upon the said judgment, or otherwise test the validity of the discharge as a release of said defendant from said judgment.

The order of the appellate division should be affirmed, with costs to the plaintiff.

Parker, Ch. J., Gray, O'Brien, Haight, Cullen and Werner, JJ., concur.

Order affirmed.

We hereby stipulate and agree that the foregoing is a copy of the opinion of the court of appeals.

N. Y. October 23d 1902.

THOS. McADAM,
Attorney for the Defendant in Error.
NELSON SMITH,
Att'y for Pl'ff in Error.

39 [Endorsed:] Return to Nelson Smith 151 W. 48th.

40 To the Hon. Rufus W. Peckham, justice of the Supreme Court of the United States:

And now comes Charles A. Tinker, petitioner, by Nelson Smith, Esq., his attorney, and complains that in the record and proceedings, and also in the rendition of an order in the suit pending in the supreme court of the State of New York, in which Frederick L. Colwell was plaintiff, and Charles A. Tinker, your petitioner, was defendant, on the remittitur from the court of appeals of the State of New York, being the highest court of law and equity of said State in which a decision could be had, remitting to said supreme court

the record in the said suit with an order affirming an order theretofore rendered in the appellate division of the supreme court of the State of New York dated the 8th and filed the 9th day of November, 1901, affirming an order made by the special term of the said supreme court of the State of New York held in the county of New York, dated July 1st, 1901, and entered in the clerk's office of said court in the county of New York on the 8th day of August, 1901, *nunc pro tunc* as of July 1st, 1901, which said remittitur from the court of appeals directed that an order be entered in said supreme court sitting in the county of New York, in favor of the said Frederick L. Colwell against the said Charles A. Tinker, your petitioner, upon which direction an order of affirmance with costs was entered in the clerk's office of the said supreme court, and filed in the said clerk's office in the county of New York on the 18th day of February, 1902, wherein was drawn in question the construction
41 of the act of Congress known as the national bankruptcy law of 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved July 1st, 1898;" and the discharge in bankruptcy granted to the petitioner, said Charles A. Tinker, by the district court of the United States for the southern district of New York, on the 2nd day of February, 1900, whereby he was discharged from all debts and claims which were made provable by said act of Congress against his estate, and which existed on the 13th day of September, 1899, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy, and which decision was against the validity of the said discharge under the said act of Congress as construed by said court of appeals, all of which appears in the record and proceedings in the said suit; manifest errors have happened to the great damage of the said Charles A. Tinker, your petitioner.

Wherefore the said Charles A. Tinker, your petitioner, by his attorney aforesaid, prays for the allowance of a writ of error, and such other proceedings as may cause the said errors to be corrected by the Supreme Court of the United States.

NELSON SMITH,
Attorney for Petitioner, 141 *Broadway*,
City & County of New York.

Allowed Oct. 23 1902.

R. W. PECKHAM,
Justice of the Supreme Court of the United States.

42 [Endorsed:] In the Supreme Court of the United States —— term—Charles A. Tinker, plaintiff in error, against Frederick L. Colwell, defendant in error Petition for writ of error. Nelson Smith, att'y for petitioner, 141 Broadway, New York city.

43 In the Supreme Court of the United States, October Term, 1902.

CHARLES A. TINKER, Plaintiff in Error,
against
FREDERICK L. COLWELL, Defendant in Error.

Assignment of Errors.

And now comes Charles A. Tinker, the plaintiff in error in the above cause, by his attorney and counsel and says; that in the record and proceedings and in the decree or order of the supreme court of the State of New York in this cause as affirmed by the judgment of the court of appeals of the said State, there is manifest error in this, to wit:

I. That the said court erred in deciding and adjudging that the discharge in bankruptcy in question granted by the district court of the United States for the southern district of New York to the plaintiff in error on the 2nd day of February, 1900, did not release and discharge the said plaintiff in error from the judgment in question recovered against him by the defendant in error in the supreme court of the State of New York on the 9th day of February, 1897, for the sum of $50,000 damages and $653.98 costs, and in denying the application of the plaintiff in error for the cancellation and discharge of record of said judgment in the office of the clerk of the said supreme court of the State of New York for the county

44 of New York, pursuant to the provisions of the statute of said State, to wit, sec. 1268 of the Code of Civil Procedure of said State, which section of said Code of Civil Procedure provides that at any time after one year has elapsed since a bankrupt was discharged from his debts pursuant to the acts of Congress relating to bankruptcy, he may apply upon proof of his discharge to the court in which the judgment was rendered against him for an order directing the judgment to be cancelled and discharged of record, and if it appears upon the hearing of such application that he has been discharged from the payment of that judgment or the debt upon which it was recovered, an order must be made directing that it be cancelled and discharged of record. Whereas by the law of the land the said court ought to have decided that the said discharge in bankruptcy released the plaintiff in error from the said judgment and ought to have directed that the said judgment be cancelled and discharged of record in the office of the clerk of the said court in the county of New York where the same was entered and docketed.

II. That the said court erred in deciding and adjudging that the plaintiff in error was not released and discharged from the said judgment in question recovered against him by the said defendant in error by the said discharge in bankruptcy in question granted to him on the 2nd day of February, 1900, in the said district court of

the United States for the southern district of New York, whereas by the law of the land the said court ought to have decided that the said discharge in bankruptcy released and discharged the plaintiff in error from the said judgment.

45 III. That the said court erred in deciding that the action in question in which the said judgment was recovered against the plaintiff in error was an action for willful and malicious injury to the person of the defendant in error, whereas by the law of the land the said court ought to have decided that the said action in which the said judgment was recovered was not an action for willful and malicious injury to the person of the defendant in error.

IV. That the said court erred in deciding that the action in question in which the said judgment was recovered against the plaintiff in error was an action for willful and malicious injury to the property of the defendant in error, whereas by the law of the land the said court ought to have decided that the said action in which the said judgment was recovered was not an action for wilful*l* and malicious injury to the property of the defendant in error.

V. That the said court erred in deciding that the said judgment in question recovered against the plaintiff in error came within the exceptions of section 17 A of the bankrupt act, and that therefore the plaintiff in error was not released by his said discharge in bankruptcy from the said judgment, whereas by the law of the land the said court ought to have decided that said judgment did not fall or come within any of the exceptions of said section 17 A of the bankrupt act, and that the plaintiff in error was released therefrom by his said discharge in bankruptcy.

46 VI. That by the record aforesaid of the said supreme court of the State of New York, it appears that the order aforesaid was given for the defendant in error against the plaintiff in error, whereas by the law of the land the said order ought to have been given for the said plaintiff in error against the said defendant in error, and therefore was erroneously given.

Wherefore the said Charles A. Tinker, plaintiff in error, prays that the order of the said supreme court of the State of New York made at special term, the order of the appellate division of the supreme court of said State affirming said order at special term, and the order of the court of appeals of the said State affirming the order of the appellate division, and the order entered in said supreme court of said State on the remittitur of the court of appeals may all be reversed with costs in each court, and that the said supreme court of the State of New York may be ordered and directed to enter an order that the said judgment recovered against the plaintiff in error be cancelled of record in the clerk's office of said court in the county of New York with the costs of this court.

CHARLES A. TINKER,
Plaintiff in Error,
By NELSON SMITH,
Att'y for Pl'ff in Error, 141 *Broadway, New York City.*

47 [Endorsed:] In the Supreme Court of the United States, October term, 1902. Charles A. Tinker, pl't'ff in error, against Frederick L. Colwell, def't in error. Assignments of error. Nelson Smith, att'y for pl't'ff in error, 141 Broadway, New York city. Due service of the within assignments of error is hereby admitted N. Y. Nov'r 11th, 1902. Thos. McAdam, att'y for def't in error.

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea, which is in the said supreme court of the State of New York, before you or some of you, entered on the remittitur from the court of appeals of said State, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frederick L. Colwell and Charles A. Tinker, wherein was drawn in question the validity of the discharge in bankruptcy granted to said Charles A. Tinker by the district court of the United States for the southern district of New York in the second circuit, under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved July 1st, 1898," and the decision was against the validity of said discharge, manifest error hath happened to the great damage of the said Charles A. Tinker, as by his complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done

49 therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, the 23d day of October in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

50 [Endorsed:] In the Supreme Court of the United States, —— term, 1902 Charles A. Tinker, plaintiff in error, against Frederick L. Colwell, defendant in error Writ of error. Nelson Smith, att'y for p'l't'ff in error, 141 Broadway, city and county of New York. Received in county clerk's office New York this 19th day of November 1902 Thos. L. Hamilton clerk

51 UNITED STATES OF AMERICA, *ss:*

To Frederick L. Colwell, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York in the city and county of New York, wherein Charles A. Tinker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States this 23 day of October, in the year of our Lord one thousand nine hundred and two.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

52 [Endorsed:] In the Supreme Court of the United States. Charles A. Tinker, plaintiff in error, against Frederick L. Colwell, defendant in error. Citation. Nelson Smith, att'y for pl't'ff in error, 141 Broadway, New York city. Served Nov. 3 1902 by F. A. C.

UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*

Frank A. Cox being duly sworn deposes and says; that he is upwards of twenty-one years of age; that on the 3rd day of November, 1902, at the city of New York he served the annexed citation on Frederick L. Colwell, to whom the same is directed, by delivering to and leaving with him personally a true copy of the said citation at his office No. 45 Broadway, in the said city and county of New York, and at the same time showing him the judge's signature to the original; that he knew the person served to be the same person mentioned and described in the said citation as the defendant in error therein, and further deponent says not.

FRANK A. COX.

Subscribed and sworn to before me this 7th day of November, 1902.

{Seal of John A. Shields, United States Commissioner, Southern District of N. Y.}

JOHN A. SHIELDS,
U. S. Com., S. D. of N. Y.

53 Supreme Court of the United States, October Term, 1902.

CHARLES A. TINKER, Plaintiff in Error,
against
FREDERICK L. COLWELL, Defendant in Error.

Please enter my appearance as attorney and counsel for the defendant in error, and I hereby waive the issuance of citation and all security for costs or otherwise on this writ.

Dated October — 1902.

THOS. McADAM,
Attorney for Defendant in Error,
220 Broadway, New York City.

To James H. McKenney, clerk.

54 [Endorsed:] In the Supreme Court of the United States. Charles A. Tinker, plaintiff in error, against Frederick L. Colwell, defendant in error, Notice of appearance, waiver of bond and issuance of citation. Thomas McAdam, att'y for def't in error, 220 Broadway, New York city.

Endorsed on cover: File No. 18,738. New York supreme court. Term No. 160. Charles A. Tinker, plaintiff in error, *vs.* Frederick L. Colwell. Filed November 21st, 1902.

FILE COPY.

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 160.

CHARLES A. TINKER,
Plaintiff in Error,

against

FREDERICK L. COLWELL,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief and Points of Counsel for the Plaintiff in Error.

NELSON SMITH,
Of Counsel for Plaintiff in Error.
141 Broadway,
City of New York.

Supreme Court of the United States,

OCTOBER TERM, 1903.

CHARLES A. TINKER,
Plaintiff in Error,
against
FREDERICK L. COLWELL,
Defendant in Error.
} No. 160.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief and Points of Counsel for Plaintiff in Error.

This is a writ of error to the Supreme Court of the State of New York to review an order of said Court in the suit of said Frederick. L. Colwell against Charles A. Tinker, entered on the decision of the Court of Appeals, holding and deciding that the discharge in bankruptcy granted to said Tinker, the plaintiff in error, did not release him from the judgment in question recovered in said suit by the said Frederick L. Colwell, the defendant in error.

Statement of Facts.

I.—On the 9th day of February, 1897, said Frederick L. Colwell, as plaintiff, recovered a judgment

against the said Charles A. Tinker, as defendant, in the Supreme Court of the State of New York, for the sum of $50,653.98, damages and costs in an action for *criminal conversation with his wife.*

The judgment roll in said action was filed in the Clerk's office of the Court and of the County of New York on the said 9th day of February, 1897, and said judgment was on that day duly docketed in the said County Clerk's office.

II.—On the 13th day of September, 1899, the said Charles A. Tinker, plaintiff in error, was duly adjudicated bankrupt, on his own petition, by the District Court of the United States for the Southern District of New York (fol. 4).

III.—On the 2d day of February, 1900, the said Charles A. Tinker, plaintiff in error, by the order and judgment of the said District Court, made in said bankruptcy proceeding, was duly discharged from all his debts and claims against him, which were made provable by the Acts of Congress relating to Bankruptcy against his estate, and which existed on the 13th day of September, 1899, the day he was adjudicated bankrupt, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy (see Petition, fols. 4, 5, and the Discharge in Bankruptcy, granted to him by Hon. Addison Brown, Judge of the United States District Court, fol. 7).

IV.—The record shows that on the application of the plaintiff in error for his discharge in the District Court, the jurisdiction of that Court, on the plaintiff's right to discharge, was raised by objections filed by the defendant in error, and exceptions thereto filed by the plaintiff in error.

The exceptions of the plaintiff in error were sustained, and the objections of the defendant in error were overruled, and the right of the plaintiff in

error to his discharge was determined and established in his favor (fols. 8-12).

V.—By the Code of Civ. Pro., Sec. 1268, it is provided that at any time, after one year has elapsed since the bankrupt was discharged from his debts, pursuant to the Act of Congress relating to bankruptcy, he may apply, upon proof of his discharge to the Court in which a judgment was recovered against him, for an order directing the judgment to be cancelled and discharged of record; and that if it appears upon the hearing that he has been discharged, an order *must be made* directing the judgment to be cancelled and discharged of record.

The following is a copy of this Section of the Code of Civil Procedure of the State of New York:

"Section 1268. (Am'd. 1899). Discharge of a judgment against a bankrupt.

"At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the Acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the Court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order, directing the judgment to be cancelled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which such judgment was recovered, an order must be made directing said judgment be cancelled and discharged of record; and thereupon the Clerk of said Court shall cancel and discharge the same by marking on the docket thereof, that the same is cancelled and discharged by order of the court, giving the date of entry of the order of discharge. Where the judgment was a lien on real property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall

not be affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy. Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment creditor, or his attorney of record in said judgment, in the same manner as prescribed in sections seven hundred and ninety-six and seven hundred and ninety-seven of the Code of Civil Procedure, if the residence or place of business of such creditor, or his attorney is known, but if unknown and cannot be ascertained after due diligence, or if such creditor is a non-resident of this State, and his attorney is dead, removed from, or cannot be found within the State, upon proof of said facts by affidavit a Judge of the Court may make an order that the notice of such application be published in a newspaper designated therein once a week for not more than three weeks, which publication, shown by the affidavit of the publisher, shall be sufficient service upon such judgment creditor, of the application."

VI.—After the expiration of one year from the time of his discharge in bankruptcy, and on or about the 12th day of June, 1901, the plaintiff in error applied to the Supreme Court of the State of New York, at Special Term, on petition and notice, pursuant to the Code of Civil Procedure, Section 1268, for the discharge of record of said judgment, and on such application presented to the Court a certified copy of his discharge under the seal of the District Court of the United States (see Notice of Motion, Petition and Discharge, fols. 1-8).

The petition of the plaintiff in error averred that said judgment was not recovered against him for a wilful and malicious injury to the person or property of another (fol. 5).

VII.—No answer or counter-affidavits were put

in to the petition. Hence the allegations of fact alleged in the petition stand admitted.

VIII.—The Court, at Special Term, by an order dated July 1st, 1901, denied the application of the plaintiff in error to cancel said judgment of record (fols. 14, 15).

IX.—The plaintiff in error then appealed from said order denying his application to the Appellate Division of the Supreme Court of the State of New York, First Department (see Notice of Appeal, fol. 16).

X.—The Appellate Division, by an order dated the 8th day of November, 1901, affirmed the order of the Special Term (see Order of Affirmance, fols. 21-22).

XI.—The plaintiff in error thereupon appealed from the order of the Appellate Division to the Court of Appeals (see Notice of Appeal, fol. 24).

XII.—The Court of Appeals made a decision affirming the order of the Appellate Division holding that the discharge in bankruptcy did not release the plaintiff in error from the judgment in question (see Remittitur, fols. 29-31, and Opinion of the Court of Appeals, fols. 35-38).

XIII.—On the remittitur from the Court of Appeals the Supreme Court entered an order bearing date February 14, 1902, making the judgment of the Court of Appeals the judgment of the Supreme Court, affirming the order of the Appellate Division with costs (fol. 32).

XIV.—And thereupon the plaintiff in error sued out the writ of error from this Court to the

Supreme Court of the State of New York to review the said order and decision (fols. 39-42).

XV.—The plaintiff in error filed assignments of error alleging that in the decree or order of the Supreme Court of the State of New York, as affirmed by the judgment of the Court of Appeals of said State, there is manifest error in this, to wit:

1. That the said Court erred in deciding and adjudging that the discharge in bankruptcy in question granted by the District Court of the United States to the plaintiff in error on the 2d day of February, 1900, did not release and discharge him from the judgment in question recovered against him by the defendant in error on the 9th day of February, 1897, for the sum of $50,000 damages and $653.98 costs, and in denying the application of the plaintiff in error for the cancellation and discharge of record of the said judgment in the office of the Clerk of said Supreme Court for the County of New York, etc.

2. That the said Court erred in deciding and adjudging that the plaintiff in error was not released and discharged by said discharge in bankruptcy from said judgment in question recovered against him by the defendant in error.

3. In deciding that the action in question in which the said judgment was recovered against the plaintiff in error was an action for a wilful and malicious injury to the person of the defendant in error; whereas, by the law of the land, it ought to have decided that the said action in which the said judgment was recovered was not an action for wilful and malicious injury to the person of the defendant in error.

4. In deciding that the action in question, in which the said judgment was recovered against the

plaintiff in error, was an action for a wilful and malicious injury to the property of the defendant in error; whereas, by the law of the land, the said Court ought to have decided that the said action in which the judgment was recovered was not an action for wilful and malicious injury to the property of the defendant in error.

5. In deciding that the said judgment in question recovered against the plaintiff in error came within the exceptions of Section 17a of the Bankrupt Act, and that, therefore, the plaintiff in error was not released by said discharge in bankruptcy from said judgment; whereas, by the law of the land, the said Court ought to have decided that said judgment did not fall or come within the exceptions of said Section 17a of the Bankrupt Act, and that the plaintiff in error was released therefrom by the said discharge in bankruptcy.

6. That by the record aforesaid of said Supreme Court of the State of New York, it appears that the order aforesaid was given for the defendant in error and against the plaintiff in error; whereas, by the law of the land, the said order ought to have been given for the said plaintiff in error against the said defendant in error, and, therefore, was erroneously given (see Assignments of Error, fols. 43-46).

POINTS.

First.—The discharge of the plaintiff in error in bankruptcy released him from the payment of the judgment in question, it not having been recovered in an action for any of the causes mentioned in the exceptions of Section 17a of the Bankrupt Act as the same existed at the time the discharge was granted.

These are words of the section:

"(Sec. 17a). A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * * * * * * * * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses, or false representations, or for wilful and malicious injuries to the person or property of another."

Bradenburg on Bankruptcy, 264.

I.—As the enacting clause of this section is general that a discharge shall release a bankrupt from all his provable debts, save such as are expressly excepted, the exceptions to it must be strictly construed and the burden is on the defendant in error to show that his debt falls within the exceptions.

U. S. *v.* Dickinson, 15 Peters, 141, 165.
Spiers *v.* Parker, 1 T. R., 141.
1 Sedgwick on Construction of Statutes (2d Ed.), 50.
Potter's Dwarris on Statutes, 118–119.

In U. S. *v.* Dickinson, *supra*, Mr. Justice Story, delivering the opinion of the Court (page 165) said:

"We are led to the general rule of law which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

In Spiers *v.* Parker, *supra*, which involved the construction of an exception in a statute.

"The rule is" said Mr. Justice Ashurst, "that any man who will bring an action for a penalty on an act of Parliament, must show himself entitled under the enacting clause; but if there be a subsequent exemption that is a matter of defense, and the other party must show it, to exempt himself from the penalty."

II.—The debts excepted are judgments recovered in actions for fraud or for wilful and malicious injuries to the person or property of another. This means that the gravamen of the action must be for fraud or for malice as the case may be.

Burnham *v.* Pidcock, 58 App. Div., 273-275; s. c. 5 Am. B. R., 590.
Matter of Rhutassel 2 Am. B. R., 697, 96 Fed. 597.
Hargadine-McKittrick Dry Goods Co. *v.* Hudson, 6 Am. B. R., 657, 111 Fed. 361-363.

In Burnham *v.* Pidcock, *supra*, judgment had been recovered in an action of tort for the conversion of property, and it was claimed that it came within the exceptions of the Act, and was covered by the word "fraud," but the Court held the claim untenable, and decided that the gravamen of the action, in which the judgment was recovered, was for conversion and controlled.

We present an extract from the opinion of the Court, by Rumsey, J. (p. 275):

"The judgments which are excepted from the effect of a discharge in bankruptcy are, as it is expressed in the statute, judgments for fraud. That phrase means that the fraud is the gravamen of the action in which judgment is recovered, and that proof of the fraud is essential to the right of recovery. It does not include a judgment in which the right of recovery is based upon an act which is

not essentially fraudulent, although in that action fraud may be incidentally shown."

III.—The construction of the act as to a judgment for conversion is equally applicable to a judgment for "*criminal conversation.*" The gravamen of the action in neither case falls within any exception of the statute.

IV.—The gravamen of the action, in which this judgment was recovered, was not for a wilful and malicious injury to the person or property of the defendant in error; but, on the contrary, was for the violation of his marital rights—the loss of *consortum* with his wife.

2 Greenleaf Ev., Sec. 51, and cases cited.
Weedon *v.* Timbrel, 5 T. R., 357.
Barnes *v.* Allen, 1 Abb. Ct. of App. Dec., 111, 117.
In re Tinker, 99 Fed. Rep., 80.
Bigaouette *v.* Paulet, 134 Mass., 123–125.

All of these cases are directly in point.

In Weedon *v.* Timbrell, *supra*, the leading case upon the subject, the action was by Weedon, the husband, against Timbrell for criminal conversation with his wife. It appeared that the plaintiff and his wife had agreed to live separately, that subsequently to their separation the plaintiff proved several acts of adultery committed by the defendant, but there was no proof of any act of adultery before the separation. The case was tried before Lord Kenyon, Chief Justice, and a jury, and the plaintiff was non-suited on the ground that the gist of the action was for the loss of the comfort and society of the wife, and as there was no evidence of any act of adultery before the plaintiff and

his wife had separated, proof of the act afterwards would not support the action.

Under a rule to show cause why there should not be a new trial—Lord Kenyon, Chief Justice; Ashurst, J.; Buller, J., and Gross, J., all held that the *gist of the action was for the loss of the comfort and society of the plaintiff's wife*, and that as the parties had separated by articles of agreement before the act of adultery, it did not appear that the plaintiff had lost anything by the conduct of the defendant.

Lord Kenyon, Ch. J., said: "This is like the case of an action by a father for the loss of service of his child, in which, however, the parent may feel for the violation of his daughter's chastity, it is clear that no action could be maintained unless some evidence be given that the daughter performed some acts of service for the father."

Ashurst, Justice, said: "The gist of this action is the loss of the comfort and society of the plaintiff's wife; that is always inserted in declarations of this kind as material and substantial allegations and the forms of pleading are evidence of the law; then, taking that as a principal, it follows that if the husband separates himself from his wife he cannot be said to be deprived of that comfort and society which he has before renounced."

The other judges were of the same opinion.

The case has been followed ever since in England and in this country.

q. v. Chambers *v.* Caulfield, 6 East., 244.
Winter *v.* Henn, 4 C. & P., 494.
Bartelott *v* Hawkes, 7 Peak's Cases, 7.
Wilton *v.* Webster, 7 C. & P., 198.
Harvey *v.* Watson, 7 M. & G., 644.

In *re* Tinker, 99 Fed. Rep., 79, Judge Addison Brown, who granted the discharge in bankruptcy, in his opinion, said:

"The gist of the action in which this judgment was recovered is the loss of the comfort, society and assistance of the wife" (referring to many cases).

In Barnes *v.* Allen, *supra* (p. 117), the Court said: "The gist of the action, as all the authorities agree, is the loss, without justifiable cause, of the comfort and society of the wife."

The case of Bigaouette *v.* Paulet, *supra*, was an action by the husband for the seduction of his wife. The opinion of the Court expresses the rule of law, we think, very clearly. We present an extract for the consideration of the Court.

ALLEN, J.:

"The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own, in the person or conduct of his wife, has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word "*consortium*," the right to the conjugal fellowship of the wife, to her company, co-operation and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences; and in such cases, the injurious consequences must be proved and it must be shown that the husband actually lost the company of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com., 139, 140, where such injuries are said to be principally three; abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." * * * The essential injury to the husband consists in the defilement of the marriage bed—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his

wife, of comfort in her society in that "respect in which his right is peculiar and exclusive."

V.—Malice is not an ingredient of an action for criminal conversation. There is no precedent for such an allegation in either the pleadings or proofs in such cases.

1 Saund. on Pl. and Ev. (5 Am. Ed.), 874–881.
Abb. Trial Ev. (2 Ed.), 863–867.

Full directions with precedents in such actions will be found in Saunders on Pleading and Evidence. Malice is not the gravamen of such actions and wholly unknown to them.

VI.—The only evidence required to support such an action is proof of the plaintiff's marriage, and the defendant's sexual intercourse with his wife.

Berdan *v.* Turney, 99 Cal., 649.

An action for criminal conversation will lie, though the defendant did not know that the woman with whom he conversed in that way was the plaintiff's wife or was married.

Wales *v.* Minor, 89 Ind., 118–121.

Rest if malice eliminate the record of the judgment is considered

VII. The strict construction of the exceptions of the statute requires that the fraud or malice be actual fraud or actual malice, and not fraud or malice implied by law; so held in the construction of the word *fraud* in the bankrupt law of 1867.

Hennequin *v.* Clews, 111 U. S., 676.
Strang *v.* Bradner, 114 U. S., 555.

The bankrupt law of 1867 respecting the effect of a discharge was in these words:

Sec. 33. "And be it further enacted that no debt contracted by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer or while acting in any fiduciary character shall be discharged under this act."

In Hennequin *v.* Clews, *supra*, Hennequin had deposited securities with Clews to be held by him as collateral security for his acceptances for Hennequin's accommodation. Clews hypothicated the securities and the action was brought by Hennequin for a fraudulent conversion. In the meantime Clews had been discharged in bankruptcy. It was held that Clews was released by the discharge in bankruptcy. That his hypothecation of the securities may have been a breach of contract or a conversion, but was not an actual and intentional fraud within the meaning of Section 33 of the brankrupt law. That the word *fraud* in that law meant actual and not implied fraud.

In Strang *v.* Bradner, *supra*, the Court again reiterated its decision that the word fraud in the bankrupt law meant actual and not implied fraud.

VIII.—The principle applies with equal force to the word *malice* in the present bankrupt law, and we submit that it should receive the same construction.

IX.—This conversation by the plaintiff in error with the wife of the defendant in error was not an injury to his person. Nothing short of an immediate physical touching can be considered a personal injury.

Mitchell *v.* Rochester Ry. Co., 151 N. Y., 107–109.

Victorian Railways Commissioners *v.* Coultas, L. R. 13 App. Cas., 222, 224–226.

Lehman *v.* Bklyn. City R. R. Co., 47 Hun, 355.

In Mitchell *v.* Rochester Ry. Co., *supra*, the plaintiff, a married lady, was injured by the negligence of the defendant, by which she was frightened in the street, and resulting in her immediate miscarriage. It was held that no recovery could be had, as there was no immediate personal injury.

In Victorian Railways Coms. *v.* Coultas, *supra*, the action was brought by James Coultas, the husband, and Mary, his wife, to recover damages sustained by the wife through the negligence of a servant of the defendants, and for expenses incurred by the husband on account of her illness. The negligence placed the wife of the plaintiff in imminent peril of being killed, whereby she received a severe shock, and suffered personal injuries resulting in impairment of health, loss of memory and eyesight.

The privy counsel held that no recovery could be had; that the personal injuries were not *immediate*, and that nothing short of an immediate personal injury would sustain the action.

X.—The criminal conversation complained of was not an injury to the property of the defendant in error.

(**1**). The husband's right of *consortium* is not property or a property right. An action for the loss of it does not survive, and is not assignable.

Cregin, adm. *v.* Bklyn. Crostown R. R. Co., 83 N. Y., 595, 596, 597.

(**2**). The above action was commenced by James Cregin, as husband, to recover for the loss of the services and society of his wife, and he having died before the trial, the action was continued in the name of Thomas Cregin, as his administrator. An appeal

was taken to the Court of Appeals from the order of continuance, and the Court held that an action by a husband against a common carrier of passengers to recover for the loss of the services of his wife and for expenses paid in consequence of injuries to her person resulting from the defendant's negligence, involved a property right, and did not abate by the death of the husband (see Cregin *v.* Brooklyn Crosstown R. R. Co., 75 N. Y., 192).

But on the trial of the case in the name of Thomas Cregin, as Administrator against the Railway Company, the Trial Court charged the jury that the plaintiff was entitled to recover for his intestate's loss of *consortium or society and comfort of his wife*, as well as for the loss of her services and the money expended for medical attendance and upon appeal the judgment was reversed, upon the ground that the administrator was not entitled to recover for his intestate's right of *consortium* or the loss of the society of his wife.

The line is distinctly drawn by the Court between a husband's right of *consortium or the society of his wife* and his right to the services of his wife. As respects his right to the services of his wife, he had a property right; but as respects his right to *consortium or society of his wife*, he has no right of property, and as to that right the action had abated.

Cregin Adm. *v.* Brooklyn Crosstown R. R. Co., 83 N. Y., 595, 596, 597.

Second.—This case is not affected in any way by the amendment of the Bankruptcy Act of February 5th, 1903. The amendatory act provides as follows:

"That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect; that such cases shall be adjudicated

and disposed of conformably to the provisions of the said act of July 1st, 1898."

Collier on Bankruptcy (4th Ed.), page 845.

Supplement 1903, 57th Congress U. S. Compiled Statutes, page 410.

Third.—The order or judgment of the Supreme Court of the State of New York and of the Appellate Division of the Court of Appeals should be reversed and the application of the plaintiff in error to have the judgment recovered against him cancelled and discharged of record in the Clerk's office of the said Supreme Court in the County of New York, should be granted, with costs in this Court and in all the Courts below.

NELSON SMITH,
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City of New York.

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Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 160.

CHARLES A. TINKER,
Plaintiff in Error,
against
FREDERICK L. COLWELL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief on Behalf of Defendant in Error.

THOMAS McADAM,
GEO. NEWELL HAMLIN,
Counsel for Defendant in Error.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

14969

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 160.

CHARLES A. TINKER,
Plaintiff in Error,

AGAINST

FREDERICK L. COLWELL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement of Facts.

On the application of the plaintiff in error for his discharge in bankruptcy in the United States District Court for the Southern District of New York, the jurisdiction of that Court and the right of the plaintiff in error to his discharge, was questioned by appropriate specifications of objections by the defendant in error and exceptions were filed thereto by the plaintiff in error.

The specifications of objections were overruled, and the plaintiff in error granted his discharge (fols. 8–11), but only, as the order granting the discharge shows, "from all debts and claims which are made provable by the bankrupt acts against his estate, and which existed on the 13th day of September, A. D. 1899, on which day the petition for adjudication was filed by him, excepting such debts as are excepted from the operation of a discharge in bankruptcy" (fols. 11, 12).

The opinion of Mr. Justice BROWN, reported in 99 Federal Reporter, at page 79, rendered upon his decision as to the effect of the said exceptions, also shows that the question as to whether the judgment—the subject matter of this discussion—was discharged or not, was left undetermined. Allusion to this opinion will be hereafter made.

Section 1268 of the New York Code of Civil Procedure provides, among other things, as follows:

> "*At any time* after one year has elapsed since a bankrupt was discharged from his debts * * * he may apply, upon proof of his discharge, to the Court in which judgment was rendered against him * * * for an order directing the judgment to be cancelled and discharged of record. *If it appears upon the hearing that he has been discharged from the payment of that judgment*, or the *debt* upon which *such judgment* was recovered, an order must be made directing said judgment to be cancelled of record. * * *"

Under this provision, the plaintiff in error applied to the Special Term of the New York Supreme Court for an order cancelling of record a judgment entered in the said New York Supreme Court against him in favor of Frederick L. Colwell, the defendant in error, for $50,653.98 damages and costs in an action which the petition in this proceeding avers simply is for *criminal conversation with said Colwell's wife* (fols. 3–6).

The Court at Special Term denied the application for the reason, as was stated by Mr. Justice GILDERSLEEVE in his opinion, *that the said judgment* was not affected by the discharge in bankruptcy of the plaintiff in error, inasmuch as the action in which it was recovered was necessarily founded upon willful and malicious injuries to the person or property of another, and therefore excepted from the operation of the discharge under Section 17, subdivision 2 of the Bankruptcy Act (fols. 19–20).

The order of the Special Term denying the application to cancel the judgment of record was on appeal duly affirmed by the Appellate Division, First Department, of the New York Supreme Court, by a unanimous Court; but with leave to the plaintiff in error to renew his application upon such additional papers as he may be advised (fol. 22), the Appellate Division, in a *per curiam* opinion, refusing to pass upon the question as to whether or not malice was involved in the acts upon which the judgment was rendered until the judgment record should be produced (fol. 28).

On appeal to the Court of Appeals of the State of New York, the order of the Appellate Division was affirmed by a unanimous Court (fol. 31), upon the distinct ground that a judgment for criminal conversation is for an injury to the person and property of the husband, which is willful and malicious, and that, therefore, the discharge in bankruptcy of the plaintiff in error does not operate to free him from the debt evidenced by the judgment here involved.

POINT I.

Within the meaning of the Bankruptcy Act, Section 17, Subdivision 2, the judgment in the action sought to be cancelled is a judgment in an action for "injuries to the person or property of the judgment creditor."

This section of the Bankruptcy Act, as it existed at the time of the application of plaintiff in error, provided that a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as are

> "Judgments in actions for frauds or obtaining property by false pretences or false representations *or for willful and malicious injuries to the person or property of another.*"

It has been said that each one of the cases enumerated in this subdivision of Section 17 of the Bankruptcy Act is exactly the same in meaning; that is to say, that they all involve a willful or intentional injury to the person or property. Under the legal definition of "willful and malicious" the provision as to fraud and false representation might very well have been left out, unless it were sought to provide for a judgment obtained in an action upon contract in which fraud or false representation were charged in the creation of the contract obligation, because where fraud or false representation are asserted in an action sounding in tort, it must be an action for injury to the property. It is enough to quote from the case mentioned:

> "The word fraud means *moral turpitude or intentional wrong*, and part of the purpose of the statute was to *discourage and punish such moral turpitude and intentional wrong.*" * * *
>
> "The statute, besides specifying judgments in

actions for fraud, also enumerates, in the disjunctive, judgment *for willful and malicious injuries to the person or property of another*, or by obtaining property by false representations."

"*The meaning in each one of the cases thus enumerated and following each other is exactly the same*, and means a judgment based on a right or injury growing out of the fraud, false pretense, false representations or willful and malicious injuries to the person or property of another."

In re Blumberg, 1 Am. Bankt. Rep., 634.

All torts or wrongs which in their nature involve willfulness and malice were meant to be included in the phrase—actions "for willful and malicious injuries to t person or property of another."

The word "injury" as here used can only mean the invasion of a legal *right* of another; in other words, a wrong done to a person in violation of his *right;* and such is its common interpretation.

Parker vs. Griswold, 17 Conn., 302.
Wrightman vs. Devere, 33 Wisc., 575.
Penn. R. Co. vs. Marchant, 119 Pa. St., 561.
Northern R. Co. vs. Carpentier, 13 How. Pr. (N. Y.), 222.
Woodruff vs. North Bloomfield Grav. Men. Co., 18 Fed., 781.

Under the general interpretation of the word "injury," it means any legal wrong which will give a cause of action for damages to the one whose *rights*, person or property are injured thereby.

Cases cited, *supra.*

The word "injury" is of broader significance than the expression "defraud." Thus, in actions for fraud or obtaining property under false pretences, the act complained of is one which is of benefit to the party sought to be charged, but, frequently, in the ordinary action for a tort, the wrong committed is one which does not in any way, pecuniarily or otherwise, benefit the party sought to be charged. Thus, it has

been held that the phrase "with intent to injure or defraud" is not to be limited in its interpretation to a malicious dealing with property for the personal advantage of the wrongdoer, but that the word "injure" is of a broader application and was doubtless inserted in the phrase to cover cases of misapplication causing injury, without benefit to the offender.

U. S. vs. Taintor, 11 Blatchf., 378.
U. S. vs. Harper, 33 Fed., 471.

Nor can it be successfully maintained that the phrase—"injuries to the person or property"—in any way limit the full scope and interpretation of the word "injury."

Injuries or wrongs giving causes of action for damages, have from time immemorial been distributed into these two great classes for the purpose of designating the character of the wrongs. On the one hand, injury to the property of another means an unlawful invasion of *any right* of property possessed by that other, and injury to the person, an unlawful invasion of any *personal right* of another.

Rights of persons are classified as absolute and relative and these will include all personal rights for the violation of which, the law grants a remedy. As was said in the case of Delamater vs. Russell, 4 How. Pr. (N. Y.), 234.

> "Rights of persons are divided into absolute and relative. Criminal conversation is classed under actions for injuries to the latter (1 Ch. Pl., 137). This classification is related by all our elementary writers" (2 Kents Com., 129; 3 Black. Con., 138).

As stated by Blackstone:

> "Rights of persons, we may remember, were distributed into absolute and relative, absolute which were such as appertained to and belonged to private men merely as individuals or single per-

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sons, and relative which were incident to them as members of society, and connected to each other by various ties and relations, and the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty and the right of private property, so that the wrong or injuries affecting them must, consequently, be of a corresponding nature."

Blackstone, Book III., pp. 118, 119.
1 Chit. Pl., 137, 1 Kent, 587 (11th ed.).
3 Black. Com., 139.

Therefore, it follows that if criminal conversation be not an injury to property, it is an invasion either of an absolute personal right or of a relative personal right. If it be an invasion of an absolute personal right, then there can be no question but that it is "injury to the person" within the narrowest meaning of that term. But being also an invasion of a relative personal right, it also is an injury to the person because an injury to the person is merely an invasion of any and all personal rights.

Authority is not wanting for this conclusion.

It has been held that, under a statute conferring jurisdiction in actions for *injuries* to persons, the words "*injuries* to persons" included *injuries* to the relative rights of persons as well as *injuries* to their absolute rights. The Court said: "Actions for seducing wives, daughters or servants, or for enticing away or harboring apprentices or servants, are said to be for *injuries* to the relative rights of persons; and we are inclined to think a justice has jurisdiction of any such actions where the damages claimed do not exceed two hundred dollars."

Wightman vs. Devere, 33 Wis., 575.

Criminal conversation at common law is an injury to the husband, entitling him to damages.

"The essential injury to the husband consists in the defilement of the marriage bed in the invasion

of his exclusive right to marital intercourse with his wife, and to beget his own children."

3 Blackstone Com., 139.

At common law, an action in trespass *vi et armis* was the usual form of remedy by a husband for the seduction of his wife, for the reason that a wife could not give her consent, and force was in consequence implied.

Woodward vs. Walton, 2 B. & P., N. N., 476.
Guy vs. Livesey, Cro. Jac., 501.
Parker vs. Bailey, 4 D. & R., 215.
16 E. C. L., 195: 1 Saunders on Pleading and Ev. (5th Am. Ed.), 875.

And it is the modern rule that force will be implied. The wife cannot, even by her conset, relieve the act of this implication.

Bedan vs. Turney, 99 Cal., 649.
Wales vs. Miner, 89 Ind., 118.
Moore vs. Hammoris, 119 Ind., 510.
Jacobson vs. Siddal, 12 Oregon, 280.

Trespass *vi et armis*, is the form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property.

Bouvier Law Dict., Vol. 2, p. 748.

And so it has been frequently held that criminal conversation is a *personal injury* or wrong to the husband, an invasion of his rights.

Delamater vs. Russell, 4 How. Pr., 234.
Strauss vs. Schwarzwallder, 4 Bas., 627.
Bedan vs. Turney, 99 Cal., 653.
1 Selw. *Nisi Prius* (13th Ed.), 7.
Rigant vs. Gallisard, 7 Mod., 81; 2 Salk., 552.
Birt vs. Barlow, 1 Doug., 171.

But in another aspect of the injury done by criminal conversation to the husband, it consists in an invasion

of his property rights. For the husband is entitled to the services of his wife and this is a right of property.

Cregin vs. Railroad, 75 N. Y., 192; 83 N. Y., 595.
Groth vs. Washburn, 34 Hun (N. Y.), 509.

And criminal conversation, inasmuch at it tends to deprive the husband of the wife's services to himself or in the bearing and proper nurture of and example to his children, is an injury to that right.

Lundt vs. Hartrunft, 41 Ill., 9.
Colwell vs. Tinker, 169 N. Y., 531.

This section of the bankruptcy law, which is now brought to this Court for construction, has been more than once construed and the Courts have been uniform in holding that it expressly excepts from a bankrupt's discharge, judgments in actions for violations of personal rights, which are relative in their nature.

Thus, judgments for damages for the alienation of a wife's affections are not barred by a discharge in bankruptcy.

Leicester vs. Hoadley, 71 Pac. R., 318.
Erline vs. Sargent, 23 Ohio Cir. Ct. Rep. 180.

And judgments for the seduction of a daughter have been held not barred.

In re Freche, 109 Fed., 620.
In re Maples, 105 Fed., 919.

By analogy to these cases and by direct authority, a judgment for criminal conversation is an injury to person and property and so within the meaning of these words in the section of the bankruptcy act here in question.

POINT II.

Criminal conversation is a malicious and willful injury.

Mr. Justice KIRKPATRICK (*In re* Freche, Vol. 6, p. 479, Am. B. R.), in a proceeding to have a father's judgment for damages for the seduction of his daughter declared inoperative by reason of a discharge in bankruptcy, refused such relief, and, among other things, said:

> "From the nature of the case, the act of the defendant which caused the injury was *willful*, because it was *voluntary*. The act was unlawful, wrongful and tortious, and, being willfully done, it was, in law, malicious. It was malicious, because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant must be presumed to have had in mind when he committed the offense. 'Malice,' in law, simply means *a depraved inclination on the part of a person to disregard the rights of others*, which intent is manifested by his injurious acts. *While it may be true that, in his unlawful act, the defendant was not actuated by hatred or revenge or passion* towards the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice."

See, also,

In re Maples, 105 Fed., 919, p. 430.
Bigelow on Torts, p. 12.

As defined by Judge BROWN in the case of United States vs. Reed, 86 Fed. Rep., 309:

> "Malice consists in one's unlawful doing of an act, or willful neglect of a known obligation, which

he knows is liable to injure another, regardless of the consequences, and a malignant spirit or a specific intention to hurt a particular individual is not an essential element."

A "malicious" injury has been defined to be "an injury committed wantonly, willfully or without cause." 2 Burill's Law Dic., 175.

> "The intentional doing of a wrongful act with knowledge of its character and without cause or excuse is malicious."
>
> Commonwealth vs. York, 9 Metc., 93, 104.
> Wiggins vs. Coffin, 3 Story, 1.
> Etchberry vs. Levielle, 2 Hilt. (N. Y.), 40.
> Rounds vs. Delaware, etc., R. Co., 3 Hun, (N. Y.), 335.

In Bromage vs. Prosser (4 Barn and Cress., 247) BAYLEY, J., said:

> "Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are; if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. * * * And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional."

This definition of malice as laid down in Bromage vs. Prosser, is the one which is universally followed

and adopted by all Courts. In the legal acceptation of the term "malice," actual malevolence or ill will need not exist. In this respect, it has also been said:

> "In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. It is not necessary to render an act malicious, that the party be actuated by a feeling of hatred or ill will towards the individual, that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he willfully inflicts a wrong on others, which is not warranted by law, such act is malicious."
>
> Commonwealth vs. Shelling, 16 Pick. (Mass.), 340.
>
> Wheeler vs. State, 109 Ala., 60.

In the books we find malice is mentioned as being of two classes—express malice and implied malice. Generally, it is said that implied malice is such malice as is implied in law from the attendant circumstances, but this does not mean, nor has it been held by the Courts to mean, that the malice which the law implies is a malice which is deemed to exist although it may not exist. Where malice is implied in law, the circumstances of the case are such as not to admit of any other presumption whatsoever; in other words that, from the nature of the act committed, it is unthinkable to suppose it could have been done without what the law defines to be legal and actual malice.

A decision of one of the United States Circuit Court of Appeals puts this very clearly. There it is said:

> "In many decisions it is laid down as a settled rule that malice is essential to a recovery in an

action of libel, but that it is conclusively implied, from the unprivileged publication of a false charge which is libellous in itself. This is indeed a settled rule of law and it is obviously a correct statement where 'malice' means, that kind of malice which is always inferred from 'a wrongful act, done intentionally, without justification or excuse'; for it is a truism to say that malice is the conclusive inference from such an act and that, since the publication of a false charge that is libellous *per se* is without justification or excuse, malice is implied therefrom. This declaration of the law is exactly the same, practically, for it is the more simple and more philosophical rule that malice, in the common acceptation of the term—that is to say, ill will, evil intent, bad motive—is not required to be either pleaded or proved to entitle the injured party to recover the actual damages he has sustained from the unprivileged publication of a false and libellous charge."

Times Pub. Co. vs. Carlisle, 94 Fed., 766.

And in this respect the opinion of the New York Court of Appeals is of value. There it is said :

"There is no difference in the nature or degree of the malice intended, whether it be called express or implied, when these terms are used in their most proper sense. If properly applied, they refer only to *the evidence* by which the existence of malice is established. Both alike, the one no less than the other, mean *actual malice*, malice shown by the proof to have really existed. It is called implied malice when it is inferred from the naked fact of the homicide, and express when established by other evidence."

Darry vs. People, 10 N. Y., 136.

See, also,

Wilson vs. Noonan, 35 Wisc., 352.

U. S. vs. King, 34 Fed., 302.

Again, as was said by LACOMBE, J., in the last-cited case:

> " Malice, in the old definition, is spoken of as express or implied. That, again, is a distinction which is a delusion and a snare. Practically, jurymen never deal with express malice. There is no express evidence of malice given to them. * * * A person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is, from a common experience, presumed to have anticipated that result and to have intended it."

Injuries or wrongs to the person or property of another may be for the purposes of this discussion then, separated into two classes—those which are willful and malicious and those in which there is an absence of malice. In the first case, as we have seen, if the act is intentional and wrongful and without just excuse, *actual malice* is present whether that malice be express or implied. In the second case, if the act is accidental, and not intentional although wrongful, malice is not necessarily present.

Where the act which constitutes the injury is of such a nature that it is obviously a wrong or illegal act in itself, and can only be committed intentionally and with the knowledge that it is a wrongful act, and where also, there can be no justification upon any grounds, for the commission of the act, malice as defined by the law must unavoidably constitute an element in the commission of the wrong. Where such are the facts it is impossible for the mind, to think the act is not intentional and the existence of these very facts logically and conclusively refute any assertion to the contrary on the part of the wrongdoer.

The Court of Appeals of the State of New York was irresistibly driven to this conclusion in arriving at a determination of the question which is now before this

Court. As was said by the learned Justice writing the opinion in this case :

> " If there is such a thing as malice in law, and if it is ever presumed by reason of the act committed, it would seem to be an action for criminal conversation, where a jury has awarded the injured husband damages in the sum of fifty thousand dollars. The defendant alleges this recovery in his petition upon which this proceeding is founded.
>
> " A person *voluntarily* invading and destroying the marriage relation is guilty of a willful, wanton act, and it is not necessary to prove that he was moved by hatred, revenge or passion towards the husband. The law in such a case implies malice, and the judgment that follows is both a willful and malicious injury to the person or property of another."

The entering into an illicit relation with the wife of the defendant in error could not have been other than voluntary and intentional on the part of the plaintiff in error. That it would result in an injury and wrong to those who might stand in the relation to her of parent or husband was certainly within the reasonable and probable consequences to be anticipated from the relation. The act being intentional, that result must have been within the possibilities present in the mind of the plaintiff in error, and so within his contemplation and fully within his intent. That there can be no legal excuse or justification for such relations with the wife of another, needs no argument. Hence, it follows from the mere fact of the relations existing between the wife of the defendant in error and the plaintiff in error, an intentional wrong was committed without justification or excuse and there was malice present in the commission of the wrong.

For it is immaterial whether the defendant in a case of criminal conversation has or has not knowledge that

the woman is married. When he engages in intercourse with a woman not his wife, he is bound to take notice of her domestic relations, and he voluntarily assumes the hazard of being held responsible for any injuries that may result.

Wales vs. Miner, 89 Ind., 118.
Calcraft vs. Harborough, 4 C. & P., 499, 19 E. C. L., 494.

The case falls within the examples given by BAYLEY, J., in Bromage vs. Prosser, *supra*, where he says :

> " if I maim cattle, without knowing whose they are; if I poison a fishery without knowing the owner—I do it of malice, because it is a wrongful act and done intentionally."

It follows, therefore, that criminal conversation, being a wrong to the husband and done intentionally, is a malicious injury to him, whether the existence of the husband be known or not.

That judgments in actions in the nature of criminal conversation are for malicious injuries to the person and property within the meaning of this section of the Bankruptcy Act has been held, as we have before seen, in the cases of the alienation of the affections of a wife and the seduction of a daughter.

Leicester vs. Hoadley, 71 Pac. Rep., 318.
Evline vs. Sargent, 23 Ohio Cir. Ct. Rep., 180.
In re Freche, 109 Fed., 620.
In re Maples, 105 Fed., 919.

And the injury being malicious is also willful, because malice implies willfulness.

State vs. Robbins, 66 Maine, 324.
Funderburk vs. State, 75 Miss., 20.

It is said that

> " Willful is a word of familiar use in every branch of law, and although in some branches of

law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

Rounds vs. Delaware, etc., R. Co., 3 Hun (N. Y.), 335; affd. 64 N. Y., 129.
State vs. Clark, 29 N. J. L., 98.
Highway Commissioners vs. Healey, 54 Mich., 181.
Newell vs. Whitingham, 58 Vt., 341.
Chapman vs. Commonwealth, 5 Whart. (Pa.), 429.

And it has been said:

"It is said by defendant's counsel that the word willful implies the idea of malice of a mild kind and even intent without excuse. Such may be its meaning in indictments and criminal statutes but it is not to be so understood here. The word means 'obstinate, stubbornly, with design; with a set purpose,' and this definition must be applied to it where it occurs in the statute under consideration."

Fuller vs. Chicago, etc., R. Co., 31 Iowa, 204.

"Willfully" means intentionally.

Bouvier, Vol. 2, 656.
Northern Railway vs. Carpentier, 13 How. Pr. (N. Y.), 22.

POINT III.

In any event the burden is on the plaintiff in error to show the lack of malice and willfulness in the acts upon which the judgment was predicated, and that the judgment was not for an injury to person or property.

Under the provisions of Section 1268 of the New York Code of Civil Procedure it was incumbent upon the plaintiff in error to show to the satisfaction of the Court in which the judgment was rendered that he had been discharged from the payment of the *particular judgment* or debt which he sought to have canceled and discharged of record, for the act provides that this fact must appear upon the hearing.

His mere statement, in his petition, "that the said judgment was not recovered against your petitioner for a willful or malicious injury to the person or property of the said Frederick L. Colwell *within the meaning of the said Acts of Congress*" (fol. 5) is a conclusion of law and not a statement of fact.

Whitton vs. Tomlinson, 160 U. S., 243.

And such an allegation cannot be deemed to be admitted by a failure to deny it.

Ritchie vs. McMullen, 159 U. S., 241.
Pullman Palace Car Co. vs. Miss. Pac. R. Co., 11 Fed., 636.
Dillon vs. Barnard, 21 Wall., 437.

The fact of the lack of malice or willfulness could have been shown, and certainly would have been shown by the then petitioner by the production by him of the judgment record and its presentation to the Court. Such was not the fact, and hence its attempted suppression.

For this very reason the Appellate Division of the

New York Supreme Court affirmed the order of the Court below and granted the plaintiff in error leave to renew his motion upon such additional papers as he may be advised (fol. 22, 28), thus distinctly throwing on him the burden of showing the non-existence of malice or willfulness in the injury, for the redress of which the judgment was rendered.

As we have seen, a judgment of this nature may involve the loss of services of the wife by the husband, and so may constitute an injury to property through the loss of such services. It was therefore also incumbent upon the plaintiff in error to establish the fact that the judgment did not involve in it the element of compensation given for the loss of the services of the wife.

Indeed, it is stated to be the settled rule as to the sufficiency of evidence that a particular debt or judgment is released by discharge in bankruptcy, that the nature of the action in which the judgment is rendered is determined by the record, and, therefore, when it is necessary to consider whether the judgment is released by a discharge in bankruptcy, the fact must be determined by the record and not by any allegation or proof outside of it.

Burnham vs. Pidcock, 58 App. Div. (N. Y.), 276.
Hargadine, McKittridge D. G. Co. vs. Hudson *et al.*, 111 Fed., 261.
In re Bullis, 7 Am. Br., 238.
Turner vs. Turner, 108 Fed., 785.

It has been heretofore asserted, however, on behalf of the plaintiff in error that the mere showing by him of the fact of his discharge in bankruptcy and of the fact of the existence of this judgment against him is sufficient to entitle him to a cancellation of the judgment in this proceeding, and that the burden is upon the defendant in error to show that this judgment comes within one of the classes which, by subdivision 2 of section 17 of the Bankruptcy Law, is exempted from the effect of a discharge in bankruptcy. He

bases this contention upon the highly technical proposition advanced by him to the effect that, when the enacting clause or purview of a statute is general, the exceptions to it must be strictly construed, and that it rests with the respondent to show that the judgment falls within some of the exceptions.

We do not understand such to be the law, and we maintain that the so-called exceptions in this statute which this Court is here called upon to construe are not necessarily exceptions, but words in the enacting clause itself, descriptive of the class of debts from which a bankrupt is not released by the operation of a discharge.

While counsel for plaintiff in error may correctly state the rule with respect to a *proviso*, he does not correctly state it with respect to an *exception* found in the general enacting clause in the provisions of a statute.

The difference between an exception and a proviso in a statute is that the first exempts absolutely from the operation of the enactment, whereas the latter only defeats the operation of the enactment conditionally. As stated in Bouvier's Law Dictionary,

> "An exception exempts absolutely from the operation of an engagement of an enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something which would otherwise be part of the subject matter of it; a proviso avoids them by way of defeasance or excuse."

As was said in Rowley vs. Janvrin, 151 N. Y., 68:

> "An exception is, generally, *part of the enactment itself*, absolutely excluding from its operation some subject or thing that otherwise would fall within its scope."

Section 17*a* of the Bankruptcy Law, which is now before this Court for construction, reads:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are judgments in actions * * * for willful and malicious injuries to the person or property of another."

Here we find the exception in the very body of the enacting clause and in the very sentence which provides for the release of a bankrupt from all of his provable debts. Certainly, it may not be said that the exception is not found in the enacting clause itself.

As was said in the case of Rowley vs. Janvrin, *supra*:

"In stating a cause of action arising upon a statute, it is an ancient rule that where an exception is incorporated in the body of the clause of a statute, *he who pleads the clause ought to plead the exception.*"

There is a technical distinction between a proviso and an exception. If there be an exception in the enacting clause of a statute, it must be negatived in pleading by the party claiming the benefit of the general enacting clause, but if there be a seperate proviso which is afterwards introduced, that need not necessarily be negatived.

Spiers vs. Parker, 1 T. R., 141; 1 Barn. & Adl., 199.
Thiebault vs. Gibson, 12 Meeson & Welshy, 88, 740.
Rowell vs. Janvrin, 151 N. Y., 60.

The case of Spiers vs. Parker, *supra*, illustrates this distinction very clearly. There the provision of the statute was that no person should be liable to be impressed or taken from certain colonies, unless he were a marine, who had deserted from a ship of war belonging to His Majesty, the King of Great Britain, and an action was brought by the plaintiff to recover a penalty granted by the statute upon the ground that he had been wrongfully impressed.

Lord MANSFIELD said:

> "The pleader who drew this declaration was clearly of opinion that it was necessary, for he has negatived what he thought to be the exception, and he was right; for it is a settled distinction between a proviso in the description of the offense and a subsequent exemption from the penalty under certain circumstances. If the former, the plaintiff must, as in actions upon the game laws, aver a case which brings the defendant within the act; therefore, he must negative the exceptions in the enacting clause."

And in Simpson vs. Ready, 12 M. & W., 736, 740, ALDERSON, B., said:

> "There is a manifest distinction between a proviso and an exception. If the exception occurs in a description of the offense in the statute, the exception must be negatived or the party will not be brought within the description. But if the exception comes by way of proviso, and does not alter the offense, but merely states what persons are to take advantage of it, then the defense must be specially pleaded, or may be given in evidence under the general issue, according to circumstances."

Here the exception in this statute, of which plaintiff in error seeks the benefit, is plainly in the enacting clause. It is contained in the very sentence which releases the bankrupt from all of his provable debts. Hence, it was absolutely necessary for the plaintiff in error to negative the fact that the judgment here sought to be canceled was not in an action for willful and malicious injuries to the person or property of the judgment creditor.

POINT IV.

The nature of the judgment here involved.

In re Cotton, 6 Fed. Cas., 3269, the learned Court, summarizing the various interpretations of bankruptcy laws, similar to subdivision 2 of the section of the bankruptcy act now in question, as applied to attempts to discharge judgments for seduction and accrued alimony, all of which have been denied :

> " In all these cases it is held that the payments provided for the judgments and decrees are of *penalties or fines imposed for wrongful or criminal acts*, or to enforce a moral or natural duty, rather tha ı of the nature of debts."

The judgment involved in this proceeding was entered on a verdict rendered by a jury for $50,000 damages for the criminal conversation of *Dr. Charles A. Tinker* with the wife of said *Frederick L. Colwell.*

It is needless to call attention to the proof essential to establish such a cause of action or to cite authorities as to the elements of the damages awarded when such a cause of action exists.

The law, well known to this Honorable Court, is well summarized in the following extracts from the learned trial Justice, Mr. Justice BISCHOFF, delivered to the jury which rendered the verdict against the alleged bankrupt in favor of said Colwell, the learned Court, among other things, said :

> " If the plaintiff has proven his allegations, that the defendant did, indeed, debauch the plaintiff's wife, and this without the plaintiff's connivance or assent, his right to your verdict would be apparent, and he would be entitled to damages, *not only as reasonable compensation for the injury, but*

also to an amount such as you find should be imposed upon the defendant to pay as a just and proper punishment, for his act, in view of all the circumstances of the case, *such an act being abhorrent to the law, and an award of exemplary or punitive damages being authorized and fitting as an example deterrent upon the commission of such offenses by the defendant and others in the future.*"

Johnston vs. Disbrow, 47 Mich., 59.
Johnson vs. Allen, 100 N. C., 131.
Cornelius vs. Hamberg, 150 Pa. St., 359.

And again, the learned trial Justice charged the jury as follows:

"*The other element of damage*—that of a punitive nature—does not depend upon compensation to the plaintiff, *but rests upon the principle that for a malicious and reprehensible act the defendant may well be punished, and the law's condemnation of the fault be given voice.* The wrongdoing of the defendant is here the test of what the award should be, and the circumstances surrounding this wrongdoing are to be viewed as of great importance in determining the character and severity of the fault.

"You are to consider, on the one hand, the means of which the defendant gained access to the plaintiff's house, and the facilities, with the attendant duty of good faith, which he had to maintain close relations with the plaintiff's wife.

"It is admitted that for several years he was the trusted family physician of the plaintiff's household, in a position whereby he was accorded, necessarily, the greatest trust with regard to the persons of those in the plaintiff's family. Especially in the case of the wife was this trust displayed. He delivered her of children and her person was in his hands, not as a man, but as a physician exercising one of the most important duties of his calling, and, from the nature of the relation which existed, facilities were given him of

private meetings with the wife, such as no man other than her husband rightfully possessed.

"If this privileged relation was employed by him to accomplish unworthy desires to satisfy his lust through wanton diregard of the trust reposed in him, and the misery which a breach of that trust would inflict upon others, no condemnation of the fault can be too severe ; but it is for you to say whether the circumstances were sueh that extreme denunciation would be just."

The jury awarded a verdict for $50,000 punitive damages "as an example deterrent upon the commission of such offenses by the defendant and others in the future."

This judgment then falls directly under the ruling in the cases above cited, "the payment provided for by the judgment being of a penalty for a wrongful act," and as the object of the statute is to discourage and punish such moral turpitude and intentional wrong," the Court will not permit the very object of the act to be thwarted in this instance.

The punitive damages awarded by this judgment, in the words of the trial Justice above quoted, "rest upon the principle that for a *malicious and reprehensible* act the defendant 'was' punished and the law's condemnation of the fault 'was' given voice.

Not all judgments or decrees against a bankrupt for the payment of money evidence debts provable against his estate, under Bankr. Act 1898, Sec. 63*a*, cl. 1, and in determining their character, the Court will look beyond the form of the judgment and consider the nature of the liability upon the original cause of action.

Turner vs. Turner, 108 Fed. Rep., 785.

Notwithstanding the change in form from that of a simple debt or duty by merger into a judgment of a court of record, it still remains the same debt or duty in which the action was first brought.

Boynton vs. Ball, 121 U. S., 457-466.

POINT V.

"The purpose of the Bankruptcy Act was to relieve failing honest debtors from their money obligations, and not to free tortious debtors from liability for their wrongs."

This is the very language used by Mr. Justice DICKEY in refusing to discharge a judgment recovered in an action for breach of promise and seduction.

Desler vs. McCauley, 35 Misc. (N. Y.), 411.

Mr. Justice BAKER, District Judge in Turner vs. Turner, 108 Fed. Rep., 785, says:

> "The object of the bankruptcy act was to relieve the honest and unfortunate debtor from the burden of his debts."

Criminal intercourse with another's wife is an *intentional* wrong, and such wrongs are always *malicious* acts, and in many of the States the subject of indictment under the criminal law.

It is almost incredible to imagine that the framers of the Bankruptcy Act intended to consider such wrongs a mere merchantable debt, after the damages have been assessed by a jury, and that the injured husband was to take his *pro rata* with ordinary creditors.

This seems to put a price upon every man's wife, with the assurance that when the extent of the injury has been determined the Federal Congress, by its enactment, makes the injured husband a contract creditor. Can such a principle be judicially declared by any Court? It is bad enough to suggest it, and then the suggestion ought to have a prompt quietus.

> "The offense charged is a most grievous wrong against social order and society; it strikes at the

foundation of the home and the legitimacy of offspring."

Mr. Justice BARTLETT in his opinion, at folio 37.

POINT VI.

The United States District Court for the Southern District of New York was without jurisdiction to grant the discharge of the plaintiff in error and the said discharge is null and void.

The judgment of Frederick L. Colwell against Dr. Charles A. Tinker was not a dischargeable debt and it was only debt set forth in the petition of the bankrupt (fols. 5 and 6). There being no dischargeable debts shown, there was nothing for the Court to discharge and it was, in consequence, without jurisdiction. The question of jurisdiction was raised by the defendant in error by his specifications of objections in the said United States District Court for the Southern District of New York. Mr. Justice KNOWLES, District Judge, *in re* Maples, 105 Fed., 919, amony other things, says in his opinion :

> " I reach the conclusion, then, that the judgment in this case is for a willful and malicious personal injury, and that it cannot be discharged under the bankruptcy act. The bankrupt, in *his petition*, therefore, has not presented any debt or claim from which this Court can discharge him. In some of the cases cited by the bankrupt's counsel, it was claimed that the discharge might operate on claims that were not scheduled. This may be true. And yet, upon a mere supposition that

possibly there might be such claims, should a Court be called upon to act and render its judgment? In regard to the federal courts, it is generally said that their jurisdiction is not general, but special, *and the grounds for exercising such jurisdiction must appear in the record.* There should always be a subject matter upon which any court can act. It ought not to be called upon to act upon a mere supposition that there might be somebody or something affected by its judgment. * * * Certainly a debt which the action of the court could not affect ought not to give jurisdiction."

This latter decision is directly in conflict with the decision of Judge BROWN in Colwell vs. Tinker, reported in 99 Fed., p. 79. Extracts from the opinion of Mr. Justice BROWN, relating to the question of jurisdiction, are quoted as follows:

"An adjudication of the above bankrupt was made September 13th, 1899, the only debt scheduled being a judgment against him for $50,653.98 damages and costs, recovered in the supreme court of this state in an action of crim con.

"On the return of the day of the application for discharge, the judgment creditor has objected (1) that the judgment is willful and malicious injury to the person or property of another and therefore will not be released by a discharge; (2) that this being the only debt scheduled, there are no debts to be discharged, and that the court therefore has no jurisdiction to grant any discharge. * * * The ordinary course of procedure in adjudging discharges, *where the court has jurisdiction of the petition,* is to grant the application, if the bankrupt is otherwise entitled to the discharge, without determining in any way its effect in releasing any particular debt, and that course should, I think, be pursued here.

"There may be other debts of the bankrupt owing to creditors, who though not named in the schedules, yet by reason of their actual knowledge of these proceedings would be barred by the discharge, even though the judgment scheduled should not be released by it.

"It cannot be said, therefore, that in the latter case the discharge would be of no possible use, or that the court has no jurisdiction to grant it. On the other hand, if not granted, its force and effect could not be adjudicated in the ordinary way by being set up as a bar to any further proceedings upon the judgment; while granting of *the discharge in this proceeding would not necessarily be res adjudicata as respects its effect as a release from this judgment. The discharge should, therefore, be granted, without any attempt at a final determination of its effect upon the judgment.*"

It is respectfully submitted that the law is correctly stated in the opinion of Mr. Justice KNOWLES.

POINT VII.

The writ of error herein should be dismissed and the order of the New York Supreme Court entered upon the determination of the Court of Appeals of the State of New York, affirmed.

Respectfully submitted,
THOMAS MCADAM,
GEORGE NEWELL HAMLIN,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 160—October Term, 1903.

Charles A. Tinker, Plaintiff in Error, vs. Frederick L. Colwell. } In error to the Supreme Court of the State of New York.

[March 21, 1904.]

The plaintiff in error applied to the Supreme Court of the State of New York for an order discharging of record a certain judgment of that court obtained against him by the defendant in error. The application was denied, (6 Am. Bank. Rep. 434,) and the order denying it was affirmed by the appellate division of the Supreme Court, (65 App. Div. 20,) and subsequently by the Court of Appeals, (169 N. Y. 531,) and the latter court thereupon remitted the record to the Supreme Court, where it remained at the time plaintiff in error sued out this writ to review the order of the Court of Appeals.

The application was made under section 1268 of the New York code, which provides that any time after one year has elapsed since a bankrupt was discharged from his debts, pursuant to the act of Congress relating to bankruptcy, he may apply, after notice to the plaintiff in the judgment, and upon proof of his discharge, to the court in which the judgment was rendered against him for an order directing the judgment to be cancelled and discharged of record. The section further provides that if it appear on hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing the judgment to be cancelled and discharged of record.

The application in this proceeding was made upon a petition by plaintiff in error, which showed that Frederick L. Colwell, the plaintiff in the action, had, on February 9, 1897, recovered a judgment for $50,000 and costs against the petitioner for damages for his criminal conversation with the plaintiff's wife; that the judgment was duly docketed in the county of New York on that day; that on September 13, 1899, petitioner filed his petition in the District Court of the United States for the Southern District of New York, praying that he might be adjudged a bankrupt, and on that day he was adjudged a bankrupt by the District Court, pursuant to the act of Congress relating to bankruptcy; on February 2, 1900, the petitioner was discharged by the District Court of the United States from all debts and claims which were made provable by the act of Congress against his estate, and which

existed on September 13, 1899; that the judgment above mentioned was not recovered against him for a willful and malicious injury to the person or property of the plaintiff, within the meaning of the act of Congress, and that by virtue of the discharge in bankruptcy the petitioner had been duly released from that judgment.

In granting the discharge under the bankrupt act (which was opposed by the plaintiff in the judgment) the district judge refused to pass upon the question whether the judgment was thereby released, although it appears that he thought it was. (99 Fed. 79.)

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The question herein arising is, whether the judgment obtained against the defendant, petitioner, for damages arising from the criminal conversation of the defendant with the plaintiff's wife, is released by the defendant's discharge in bankruptcy, or whether it is excepted from such release by reason of subdivision 2, section 17, of the bankruptcy act of July 1, 1898, which provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; . . ."

The averment in the petition, that the judgment was not recovered for a willful and malicious injury to the person or property of the plaintiff in the action, is a mere conclusion of law and not an averment of fact.

If the judgment in question in this proceeding be one which was recovered in an action for willful and malicious injuries to the person or property of another, it was not released by the bankrupt's discharge; otherwise it was.

We are of opinion that it was not released. We think the authorities show the husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful. A judgment upon such a cause of action is not released by the defendant's discharge in bankruptcy.

The assault *vi et armis* is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts,

which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children.

Subsequently the action of trespass on the case was sustained for the consequent damage, and either form of action was thereafter held proper.

Blackstone, in referring to the rights of the husband, says (3 Black. Com. edited by Wendell, page 139):

"Injuries that may be offered to a person, considered as a *husband*, are principally three: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. . . . 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary."

Speaking of injuries to what he terms the relative rights of persons, Chitty says that for actions of that nature (criminal conversation being among them) the usual and perhaps the more correct practice is to declare in trespass *vi et armis* and *contra pacem*. (1 Ch. Pl. [2 vol. ed.] 150, and note *h*.)

In *Macfadzen* v. *Olivant*, (6 East, 387,) it was held that the proper action was trespass *vi et armis*, for that the defendant with force and arms assaulted and seduced the plaintiff's wife, whereby he lost and was deprived of her comfort, society and fellowship against the peace and to his damage. Lord Ellenborough, C. J., among other things, said:

"Then the question is, whether this be an action on the case or an action of trespass and assault? And it is said that the latter description only applies to personal assaults on the body of the plaintiff who sues; but nothing of the sort is said in the statute. No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant *per quod servitium amisit*; and also by a husband for a trespass and assault of this kind upon his wife *per quod consortium amisit*."

In *Rigaut* v. *Gallisard*, (3 Mod. Rep. 78,) Lord Holt, C. J., said that if adultery be committed with another man's wife, without any force, but by her own consent, the husband may have assault and battery, and lay it *vi et armis*, and that the proper action for the husband in such case was a special action, *quia*—the defendant his wife *rapuit*, and not to lay it *per quod consortium amisit*.

In *Haney* v. *Townsend*, (1 McCord's Rep. 106, decided in 1821,) it was held that case as well as trespass *vi et armis* is a proper action for criminal conversation, the court holding that no doubt trespass was a proper form of action for the injury done by seducing a wife, but that case was also a proper action.

In *Bedan* v. *Turney*, (99 Cal. 619, decided in 1893,) it was held that the criminal intercourse of the wife with another man was an invasion of the husband's rights, and it was immaterial whether this invasion was accomplished by force or by the consent of the wife; that the right belonged to the husband, and it was no defense to his action for redress that its violation was by the consent or even by the procurement of the wife, for she was not competent to give such consent; that it was not necessary that the husband should show that it was by force or against her will. The original form of the action was *trespass vi et armis*, even though the act was with the consent of the wife, for the reason, as was said by Holt, C. J., in *Rigaut* v. *Gallisard*, (3 Mod. Rep. 78.) "that the law will not allow her a consent in such case to the prejudice of her husband."

In *M'Clure's Executors* v. *Miller*, (11 N. C. Rep. [4 Hawks.] 133, note, page 140), trespass was held to be the proper form of action in such a case, and that a single act of adultery, though never manifested in its consequences, is an invasion of the husband's rights, and the law redresses it. It is also said that the husband has, so to speak, a property in the body and a right to the personal enjoyment of his wife. For the invasion of this right the law permits him to sue as husband.

For the purpose of maintaining the action, it is regarded as an actual trespass upon the marital rights of the husband, although the consequent injury is really to the husband on account of the corruption of the body and mind of the wife, and it is in this view (that it is a trespass upon the rights of the husband) that it is held that the consent of the wife makes no difference; that she is incapable of giving a consent to an injury to the husband. (3 Mod. Rep. 78.)

In *Wales* v. *Miner*, (89 Ind. 118, decided in 1883,) it was held that in an action of *crim. con.* the wife was incapable of consenting to her own seduction so as to bar her husband's right of action.

In *Bagaoutte* v. *Paulet*, (134 Mass. 123,) it was held the action could be maintained whether the conversation was with or without the consent of the wife, and although the act caused no actual loss of the services of the wife to the husband.

Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right.

In *Delamater* v. *Russell*, (4 How. Pr. Rep. [N. Y.] 234,) it was held that the act complained of (criminal conversation) was an injury to the person of the plaintiff; that it was an invasion of his personal rights, and

although the action was brought for depriving the plaintiff of the comfort, society, fellowship, aid and assistance of the wife, yet it was an action brought for an injury to and an invasion of the plaintiff's personal rights.

The plaintiff in error refers to the case of *Cregin* v. *Brooklyn Crosstown Railroad Company*, (75 N. Y. 192; same case upon second appeal, 83 Id. 595,) for the purpose of showing that the right to the society of the wife is not property, and therefore cannot be regarded as within the words of the bankruptcy act. The case does not decide that the right to the wife's society and comfort is not a property right on the part of the husband. It was a case brought by the husband against the railroad company for injuries negligently inflicted on the person of his wife by the company, and after the action was brought the husband died, and an application was made to revive the action in the name of the administrator of the husband. The court held that the action survived under the provisions of the State statute. (2 R. S. 447; section 1.) The case then went to trial and the judge submitted to the jury the question of damages arising for the loss of the services of the wife and of her society, and it was held to be error by the Court of Appeals, because, while the right to the services of the wife was property, the right to her society, &c., was not property within the meaning of the statute providing for the survival of the cause of action, for the reason that the statute only provided for the survival of those rights the loss of which diminished the estate of the deceased; that the loss of the services of the wife did diminish the estate of the deceased, but that the loss to the husband of the wife's society and aid, &c., did not diminish his estate, and therefore the right of action consequent thereon did not survive the deceased. The question in the case at bar neither arose nor was referred to in the opinions delivered in that case.

We think it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, to the exclusion of all others, and so the act of the defendant is an injury to the person and also to the property rights of the husband.

We think such an act is also a willful and malicious injury to the person or property of the husband, within the meaning of the exception in the statute.

There may be cases where the act has been performed without any particular malice towards the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute. The

act is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.

In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.

In *Bromage* v. *Prosser*, (4 Barn. & Cres. 247,) which was an action of slander, Mr. Justice Bayley, among other things, said:

"Malice, in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of *malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it of *malice*, because it is intentional and without just cause or excuse. If I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not. . . ."

We cite the case as a good definition of the legal meaning of the word malice. The law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the exception mentioned.

In *In re Freche*, (U. S. District Court, District of New Jersey, 1901, 109 Fed. 620,) it was held that a judgment for the father in an action to recover damages for the seduction of his daughter was for a willful and malicious injury to the person and property of another, within the meaning of section 17 of the bankrupt act, and was not released by a discharge in bankruptcy. Kirkpatrick, District Judge, in the course of his opinion, said:

"From the nature of the case, the act of the defendant Freche which caused the injury was willful, because it was voluntary. The act was unlawful, wrongful and tortious, and, being willfully done, it was, in law, malicious. It was malicious because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant Freche must be presumed to have had in mind when he committed the offense. 'Malice,' in law, simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. While it may be true that in his unlawful act Freche was not actuated by hatred or revenge or passion towards the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice."

In *Leicester* v. *Hoadley*, (Supreme Court of Kansas, 1903, 91 Pac. Rep. 318,) it was held that a judgment obtained by a wife against another woman for damages sustained by the wife by reason of the alienation of the affections of her husband is not released by the discharge of the judgment debtor under proceedings in bankruptcy, where such alienation has been accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support and impairment of health to the wife.

It was further held that injuries so inflicted are willful and malicious, and are to the person and property of another, within the meaning of section 17 of the United States bankrupt law.

In *United States* v. *Reed*, (86 Fed. 308,) it was held that malice consisted in the willful doing of an act which the person doing it knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle, we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception.

It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. (*Commonwealth* v. *Williams*, 110 Mass. 401.)

We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor and not a malicious wrongdoer that was to be discharged.

Haviland v. *Carson*, (28 Oh. St. Rep. 625,) is cited by plaintiff in error. The question arose under the old bankruptcy act, which provided (U. S. R. S. sec. 5117) that no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, should be discharged by proceedings in bankruptcy, &c. It was held in the case cited that a judgment for the seduction of his daughter in favor of the father, where the seduction was not induced or accomplished under a promise of marriage fraudulently made for the purpose, was not a debt created by fraud, within the meaning of the bankruptcy act. We do not perceive the least similarity in the case to the one now before the court, nor could we say that such a debt was one created by fraud.

It is also argued that, as the fraud referred to in the exception is not one which the law implies, but is a particular fraud involving moral turpi-

tude or intentional wrongdoing, so the malice referred to is not a malice implied in law but a positive and special malice upon which the cause of action is founded, and without proof of which the action could not be maintained. It is true that the fraud mentioned in the bankruptcy statute of 1867 has been held to be a fraud involving moral turpitude or intentional wrong, and did not extend to a mere fraud implied by law. (*Hennequin* v. *Clews*, 111 U. S. 676, 681; *Forsyth* v. *Vehmyer*, 177 Id. 177.) The reason given was that the word was used in the statute in association with a debt created by embezzlement, and such association was held to require the conclusion that the fraud referred to meant positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not a fraud which the law might imply and which might exist without the imputation of bad faith or immorality.

Assuming that the same holding would be made in regard to the fraud mentioned in the present act, it is clear that the cases are unlike. The implied fraud which the court in the above cited cases released was of such a nature that it did not impute either bad faith or immorality to the debtor, while in a judgment founded upon a cause of action, such as the one before us, the malice which is implied is of that very kind which does involve moral turpitude. This case is not, therefore, controlled in principle by the above cited cases.

The *People ex rel. &c.* v. *Greer*, (43 Ill. 213,) is also cited. The court there did hold that, under the Illinois insolvent law, an insolvent debtor was discharged from a judgment obtained by the father for the seduction of his daughter. The law discharging the debt extended by its terms to all tort feasors except where malice was the gist of the action, and the court said malice was not the gist of the action in question. The case is not opposed to the views we have already expressed.

It is not necessary in the construction we give to the language of the exception in the statute to hold that every willful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True he drives negligently, and that is a wronful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious. It might be conceded that the language of the exception could be so construed as to make the exception refer only to those injuries to person or property which were accompanied by particular malice, or, in other words, a malevolent purpose towards the injured person, and where the action could only be maintained upon proof of the existence of such malice. But we do not think the fair meaning of the statute would thereby be carried out. The judgment here mentioned comes, as we think, within the language of the statute reasonably construed. The injury for which it was recovered is one of the grossest

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which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself, and we think Congress did not intend to permit such an injury to be released by a discharge in bankruptcy.

An action to redress a wrong of this character should not be taken out of the exception on any narrow and technical construction of the language of such exception.

For the reasons stated, we think the order of the Court of Appeals of New York must be

Affirmed.

Mr. Justice BROWN, Mr. Justice WHITE and Mr. Justice HOLMES dissent.

True copy.

Test:

Clerk Supreme Court, U. S.